Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1994

GAYLE F. TRULY, SECRETARY OF THE LOUISIANA DEPARTMENT OF LABOR AND ADMINISTRATOR,

Petitioner,

versus

BAYOU STEEL CORPORATION,

Respondent,

and

HARRY ABADIE, JR., et al.,

Respondent.

Petition For Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For unemployment compensation purposes, under the following conditions:

a) claimant is a union worker who was performing services for remuneration under collective-bargaining agreement;

b) term of collective-bargaining agreement expires;

c) claimant and former employer fulfilled obligations under the collective-bargaining agreement during the term of such agreement;

d) on day after termination of employment contract, claimant ceases to perform services for remuneration;

e) while former employer offers claimant terms of new contract of hire, it hires new workers for replacement under written agreement for indefinite, at-will employment; and

f) the union is interested in further negotiation of terms of reemployment of its membership

and where the sole governing bodies of federal law for administration and certification of any State unemployment compensation program are the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA):

a. Whether judgment by the Louisiana Court of Appeal, Fifth Circuit, styled *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La.App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403, is erroneous in

QUESTIONS PRESENTED – Continued

its application of the concept of definition of "employee" under the National Labor Relations Act (NLRA), rather than application of the concepts of definitions of "employment" and "unemployment" under SSA and FUTA, for determination of benefits under the unemployment compensation program for union-affiliated claimants.

b. Whether such claimant rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution are violated by the administration of the unemployment compensation program under judicial interpretation of the Louisiana Court of Appeal, Fifth Circuit, styled *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La.App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403, which applies the concept of definition of "employee" under the NLRA, rather than the concepts of definitions of "employment" and "unemployment" under SSA and FUTA, for determination of benefits under the unemployment compensation program for union-affiliated claimants.

c. Whether such claimant rights under the Due Process Clause of the Fifth Amendment of the United States Constitution are procedurally violated by the administration of the unemployment compensation program under judicial interpretation of the Louisiana Court of Appeal, Fifth Circuit, styled *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La.App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403, which applies

QUESTIONS PRESENTED – Continued

the concept of definition of "employee" under the NLRA, rather than the concepts of definitions of "employment" and "unemployment" under SSA and FUTA, for determination of benefits under such program for union-affiliated claimants and whereby the LDOL will be unlawfully and unconstitutionally restricted to ask in the future whether (1) the claimant is a member of a union and (2) whether the work of such claimant and his union-affiliated cohorts is discontinued without delving further to determine other facts (i.e. cause of unemployment, status of contract of hire), as will be inquired of any non-union claimant.

PARTIES

Petitioner Gayle F. Truly, Administrator of the Office of Employment Security and Secretary of Labor, a defendant in this matter for judicial review of unemployment compensation, is a statutory party under LSA-R.S. 23:1634, which provides the basis and jurisdiction for judicial review of the State courts, in support of award of unemployment compensation benefits to claimants and has a statutory duty to administer and enforce laws and programs designed to protect Louisiana's work force and to represent the public interest in the administration of Louisiana employment security law. LSA-R.S. 36:304. She is to ensure that the provisions for the unemployment compensation program are so interpreted and applied as to meet the requirements of federal constitutional and statutory laws and regulations. U.S. Const. amend. V; U.S. Const. amend. XIV; 42 U.S.C. 1983; 42 U.S.C. 503; LSA-Const. Art. 1, Sections 2 and 3; LSA-R.S. 36:304; LSA-R.S. 23:1471 et seq.; LSA-R.S. 23:1627.

Respondent Bayou Steel, employer-defendant in this matter for judicial review, is a statutory party under LSA-R.S. 23:1634 in opposition to Petitioner's award of unemployment compensation benefits to union claimants.

Respondents Harry Abadie, Jr. et al[1], claimant-plaintiffs in this matter for judicial review, are the approximately 231 statutory parties under LSA-R.S. 23:1634, in favor of Petitioner's award of unemployment compensation benefits to such union claimants.

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[1] See Appendix for list of Respondent Claimant Parties.

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Petitioner Gayle F. Truly, Administrator of the Office of Employment Security and Secretary of Labor respectfully petitions for a writ of certiorari to review the judgment in *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La.App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403 (writs denied).

OPINIONS BELOW

The opinion in *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La.App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403, writs denied.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on February 3, 1995.

Jurisdiction of this Court is invoked generally under the U.S. Constitution, art. 3, Section 1; U.S. Constitution, art. 3, Section 2, Clause 1; and specifically under 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(a) Constitutional Provisions:

U.S. Const. amend. 5
U.S. Const. amend. 14

(b) Statutory Provisions:

26 U.S.C. 3301 et seq. (Federal Unemployment Tax Act)
42 U.S.C. 501 et seq. (Social Security Act)
29 U.S.C. 151 et seq. (National Labor Relations Act)
42 U.S.C. 1983 et seq. (Civil Action for Deprivation of Rights)

Significant constitutional provisions and statutes involved in the case, as well as the pertinent text, setting them out verbatim, and giving appropriate citation therefor are provided in the Appendix. The Appendix also includes pertinent text of significant State constitutional provisions, statutes, and cases.

STATEMENT OF THE CASE

A. SYNOPSIS

This case involves approximately 231 union-affiliated claimants who performed services for remuneration under collective-bargaining agreement, which term was extended twice during negotiations that began prior to expiration of term of the original contract. On the day after the expiration of the extended contract, claimants ceased to perform services for remuneration, thus were not "employed" under the concepts of definitions of FUTA and SSA. After two extensions to the original term of the contract, former employer and claimants could not and have not reached agreement as to terms of new contract of hire although negotiations have continued. Immediately after the expiration of the extended contract, the Company hired replacement workers under written

agreement for indefinite, at-will employment. This case does not involve a work stoppage during the term of the collective-bargaining agreement. During the term of the collective-bargaining agreement, the parties fulfilled their obligations under the agreement.

For the ease and convenience of the court, the following is the sequence of events in approximate, chronological order:

> January 15, 1993: Company and union begin discussions of new terms of upcoming contract.
>
> February 24, 1993: (1) Union membership authorizes strike if settlement cannot be reached at expiration of contract. (2) On or about this date, Company preparations for strike include plans to hire replacement workers in event of strike.
>
> February 28, 1993: (1) Original expiration of contract. (2) Company and union agree to two (2) separate extensions to the collective-bargaining agreement. (Term of second extension of contract expires March 20, 1993 midnight.)
>
> March 19, 1993: Company and union fail to reach settlement on terms of new contract; union gives Company 48 hours notice of strike.
>
> March 20, 1993: Company makes offer to union and informs union that if offer rejected, employer will determine that an impasse has been reached and that the conditions of the previous March 19 offer will be imposed. Union officials, through authority of February 24 vote of membership, reject the Company offer and advise Company that strike will proceed.
>
> March 21, 1993: First day after expiration of extensions for collective-bargaining agreement.

March 23, 1993 and/or earlier: Likely commencement of hiring of replacement workers.

April 21, 1993: Louisiana Department of Labor (LDOL) makes initial determination of filed claims upon gathered information and disqualifies claimants for benefits under LSA-R.S. 23:1601(4).

April 1-21, 1993: Telephone investigation by LDOL.

April 27, 1993: On-site visit to Company by LDOL.

May 4, 1993: LDOL makes subsequent determination upon review of findings through further investigation and on-site visit to Company for qualification of claimants for benefits.

B. FINDINGS OF FACT

Judicial review by the Louisiana State courts is limited under the provisions of LSA-R.S. 23:1634 to the findings of fact in the decision of the Louisiana Board of Review. Such findings of fact are provided in the Appendix. Questions presented to this Court were considered and presented by Petitioner in all stages of the State court proceedings. The method of raising them and the way in which they were passed upon by those courts, including such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears as will show that the federal questions were timely and properly raised so as to give this Honorable Court jurisdiction to review the judgment on a writ of certiorari, are provided in the Appendix.

REASONS FOR GRANTING THE PETITION

1.

IMPORTANT QUESTION OF FEDERAL REMEDIAL LAW WHICH CONFLICTS WITH FEDERAL CONSTITUTIONAL AND STATUTORY LAW

Issues of Significant Public Importance

This case is of significant public importance because the decision below is erroneous, and the issues that it addresses are important for the fair administration of the State unemployment compensation program. Unemployment is the greatest hazard of our economic life. *National Gypsum Company v. Administrator, Louisiana Department of Employment Security,* 313 So.2d 230 (La. 1975). The State court has decided an important question of federal remedial law which conflicts with federal constitutional and statutory law and should be settled by this Honorable Court. The judgment of the State court forces the State unemployment compensation program to penalize the constitutional and statutory rights of approximately 231 union-affiliated claimants, who have been deprived unemployment compensation benefits due to judicial discrimination against their union affiliation, although such claimants fulfilled the obligations under the terms of their collective-bargaining agreement with their former employer for purposes of unemployment compensation during the term of the collective bargaining agreement. The basis of this judicial penalty arises out of failure to apply the proper body of law.

The Federal Unemployment Tax Act and the Social Security Act, as sole governing bodies of federal law for State unemployment compensation program, pre-empts

State law in specific manner to accomplish uniformity for certification for federal funding. Such statutory pre-emption reflects congressional intent, which would not embrace the creation by the State court of classes of claimants under discriminatory treatment in violation of constitutional rights to equal protection and due process for the award of unemployment compensation. The language of the State statute itself in the Louisiana Employment Security Law under LSA-R.S. 23:1601(4), however, does not result in unfair treatment. If a union worker discontinues his work during the term of employment in dispute with his employer, such disqualification justifiably applies in accordance with the statutory prohibition. If the cause of unemployment, for purposes of unemployment compensation, however, is the expiration of contract, such as, in this case, such cause should be recognized and examined as would for the non-union worker. *National Gypsum*, 313 So.2d 230. There is no compelling justification by the State court to ignore the expiration of contract for the union worker in contrast to the non-union worker. There is no evidence that Congress enacted the National Labor Relations Act, 42 U.S.C. 151, with the intent to utilize such federal act as a basis for denial to the states the provision of unemployment compensation to union workers whose contracts of hire have expired. *New York Telephone Company v. New York State Department of Labor*, 99 S.Ct. 1328, 440 U.S. 519 (1979). It is the erroneous judicial interpretation of such disqualifying provision by the State court that has extracted federal labor law to create a class of union-affiliated claimants whose term of employment contract, upon expiration, is completely disregarded in direct contrast to the non-

union claimant. The omission of any direction under the National Labor Relations Act or the Social Security Act for payment of unemployment compensation under labor relations implies that the states have the power to fashion such policy; however, any denial of payment of such benefits should not be based upon speculation about the unexpressed intent of Congress. *New York Telephone v. New York State Department of Labor,* supra. *This important issue presented to court is, thus, a very novel one in regard to unemployment compensation involving labor disputes. The freedom of the state to dictate policy as to the qualification requirements in claims involving any labor dispute is not the challenged issue heard in prior court deliberations. The prerogative of the state court to interpret any such state qualification provision so as to unfairly distinguish between the union and non-union worker upon expiration of contract is rather the serious question presented for hearing before this court for the first time.*

The effect of this misapplication of the concepts of the NLRA to the unemployment compensation program entraps the union worker in that once he signs that first collective bargaining agreement with that employer, he waives, releases, and commutes his rights, which is completely and absolutely contrary to the provisions of 42 U.S.C. 503(a)(1), unless and until such time that employer closes his business. In contrast, expiration of contract for the non-union worker is recognized.

The judicial interpretation is, furthermore, fundamentally erroneous as any right to unemployment compensation benefits cannot be waived, released, or commuted, in accordance with the SSA, and there can be no collective bargaining of such to address in labor-management negotiations. 42 U.S.C. 503(a)(1); LSA-R.S. 23:1691.

The misapplication of federal law and failure to recognize the constitutional rights of union-affiliated claimants subject them to an endless state of limbo as to status of employment, for unemployment compensation purposes, resulting in disparate treatment for purposes of disqualification of classes of claimants. If expiration of contract is not recognized for the union worker in unemployment compensation matters, the term of the contract is endlessly open-ended, and such term actually becomes unimportant as early as that moment the union worker first signs the first collective bargaining contract with that employer. The effect of this misapplication of the concepts of the NLRA to the unemployment compensation program entraps the union worker in that once he signs that first collective bargaining agreement with that employer, he waives, releases, and commutes his rights, unless and until such time that employer closes his business, which is completely and absolutely contrary to the provisions of the § 303(a)(1) of the SSA. In contrast, expiration of contract for the non-union worker is recognized.

Further, the misapplication of concepts of federal law by the State courts negates the positions of neutrality of the State by encouraging delay on the part of the employer to reach a meeting of the minds on the terms of a new collective bargaining agreement, whereby the expiration of the contract of the employment relationship is not recognized as long as the State court remains misdirected in its concept of employment for purposes of unemployment compensation, there is no encouragement of prompt resolution and negotiation, thereby tipping the scale for balance of hardship in favor of one party and

threatening social security and the very protection of the unemployment compensation program against unemployment, as should be defined by the proper federal law under FUTA and SSA, making a mockery of the unemployment compensation program as a remedial program and protector against unemployment.

This application does not seek to challenge the propriety and constitutionality of the language of the State statute or regulate or prohibit private conduct or behavior in the labor-management field. Further, it does not ignore the applicability of other provisions for disqualification for unemployment compensation benefits under particular circumstances for the union-affiliated claimant. This application rather involves the misinterpretation of State law by the State court of a State program for distribution of unemployment compensation benefits to certain members of the public and the manner in which such program treats claimant where:

a) claimant is a union worker who was performing services for remuneration under collective-bargaining agreement;

b) term of collective bargaining agreement expires;

c) claimant and former employer fulfilled obligations under the collective bargaining agreement during the term of such agreement;

d) on day after termination of employment contract, claimant ceases to perform services for remuneration;

e) while former employer offers claimant terms of new contract of hire, it hires

replacement workers under written agreement for indefinite, at-will employment; and

f) the union is interested in further negotiation of terms of reemployment of its membership,

in violation of the sole governing bodies of federal law under FUTA and SSA for the administration and certification of any State unemployment compensation program as well as in violation of constitutional law.

While Congress has been sensitive to the importance of the State's interest to fashion its own unemployment compensation programs, especially its own eligibility criteria, such state freedom does not rise to the level or include discrimination of certain classes of claimants in violation of federal constitutional and statutory law.

2.

JUDICIAL INTERPRETATION CONFLICTS WITH STATUTORY LAW

Federal Unemployment Tax Act (FUTA) – Social Security Act (SSA) – National Labor Relations Act (NLRA)

The United States Congress has recognized the nature of unemployment compensation as remedial in the embodiment of the Federal Tax Unemployment Tax Act (FUTA) at 26 U.S.C. 3301 et seq. and the Social Security Act (SSA) at 42 U.S.C. 501 et seq. and did not supercede or replace such law with the National Labor Relations Act (NLRA) at 29 U.S.C. 151 et seq. for purposes of unemployment compensation.

Judicial interpretation by the State court of qualification for entitlement of unemployment compensation under LSA-R.S. 23:1601(4), which pertains to qualification under a labor dispute, however, ignores the concepts of definitions of "employment" and "unemployment" under the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA), the sole governing bodies of federal law for unemployment compensation benefits, which do require performance of services for remuneration for determination of benefits of the unemployed. 26 U.S.C. 3306. Rather the judicial interpretation by the State court imposes upon the State unemployment program to erroneously create an artificial state of employment imposed by the concepts of another body of law, specifically the NLRA, a separate and distinct body of federal law that addresses collective bargaining. *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La. App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403. Most importantly, the judicial interpretation by the State court imposes the NLRA definition of "employee" to the union-affiliated claimant, a term that, contrary to FUTA and SSA, does not require the performance of services for remuneration. The State court decision incorrectly concludes that such union claimants have not lost their employment contract because employment continues during a labor dispute under the concept of "employee" under the NLRA. 29 U.S.C. 152. The State court further assumes that expiration of contract is not pertinent for unemployment purposes because the concept of "strike" under the NLRA exists even after expiration of the contract of hire. 29 U.S.C. 142. Such

conclusions reflect complete confusion of the State court, consistent with a line of Louisiana jurisprudence, as to the applicability of the proper body of law for unemployment compensation purposes. The unmistakable result of such judicial confusion over applicable federal law is creation of a class of claimants unfairly and unequally treated from other claimants. *Elmer Candy Corporation v. Administrator of Employment Security,* 286 So.2d 423 (La.App. 1 Cir. 1973), rehearing denied; *Piggly Wiggly of Springhill, Inc. v. Gerace,* 370 So.2d 1327 (La.App. 2 Cir. 1979).

The judicial interpretation is, furthermore, fundamentally erroneous as any right to unemployment compensation benefits cannot be waived, released, or commuted, in accordance with the SSA, and there can be no collective bargaining of such to address in labor-management negotiations. 42 U.S.C. 503(a)(1); LSA-R.S. 23: 1691.

Under such judicial interpretation, union-affiliated claimants who have fulfilled their obligations under contract, for unemployment compensation purposes, are considered employees although their contract of hire has expired and they are no longer performing services for remuneration.

3.

CONSTITUTIONAL REASONS

Equal Protection Under U.S. Constitution, Amendment XIV; Procedural Due Process Under U.S. Constitution, Amendment V

A. Equal Protection

The LDOL is mandated to enforce a manifestly erroneous State court interpretation of federal constitutional

law which adversely impacts the public interest in the administration of the State unemployment compensation program. 42 U.S.C. 1983 et seq. The rights of such claimant under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution are violated by and under the administration of the unemployment compensation program, whereby the provisions of the NLRA for the definition of "employee" apply to the union-affiliated unemployment compensation claimant. 29 U.S.C. 152.

This State court decision follows the long line of Louisiana jurisprudence that does not recognize the cause of unemployment for the union worker. *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al., supra.* The State court, including the Louisiana case law, takes a simplistic approach of automatically disqualifying a union claimant without further examination as to cause of separation from employment. The status of the contract of hire and the issue of performance of services for remuneration are not reviewed, as for all claimants. For purposes of unemployment compensation, however, there is a separation from employment at the moment of termination of any such employment relationship, consistent with the concept of employment under federal law. 26 U.S.C. 3306. The conflicting result is that the status of the hiring contract is factually examined for non-union workers but is not examined for union workers. If a non-union worker files an unemployment compensation claim upon termination of his contract, such cause of separation from employment will be recognized and examined by the State courts to determine qualification. On the other hand, the State court dictates that the cause of separation

from employment for a union worker is not examined. Such distinction by the State courts mandates disparate treatment of the union worker compared to the non-union worker for unemployment compensation purposes. The equal protection rights of the union worker are, thus, violated by the decision of the State court. U.S. Const. amend. 14; LSA-Const. Art. 1, Section 3. The relevant State provision for disqualification due to a labor dispute distinctly states that unemployment must be due to a labor dispute. LSA-R.S. 23:1601(4). Yet the facts of the case at hand show that, for purposes of unemployment compensation, the unemployment of the union workers arose due to the expiration of the employment contract. Indeed, this is not a case of breach of contract or of a "wildcat" strike. At the moment of expiration of the employment contract, the union-affiliated claimants no longer performed work for remuneration and were unemployed for purposes of unemployment compensation. LSA-R.S. 23:1472(12)(A); LSA-R.S. 23:1472(19)(a). For unemployment compensation purposes, the employment relationship of the employer and claimants ended. Any work stoppage did not occur until the expiration of the contract. The State court, including the State jurisprudence, has consistently failed to recognize that the actual cause of unemployment for the union worker must be fully examined rather than assumed under law in the same order and manner as for the non-union claimant. LSA-R.S. 23:1601. Where the cause of unemployment is ignored, such discriminatory result occurs.

B. Procedural Due Process

Where the union-affiliated claimant is automatically disqualified under the labor dispute disqualification, he,

furthermore, is not equally granted the procedural due process under Amendment V of the United States Constitution as is afforded the non-union claimant. LSA-Const. Art. 1, Section 2. Again, the effect of the misapplication of the concepts of the NLRA to the unemployment compensation program entraps the union worker in that once he signs the first collective bargaining agreement with that employer, he waives, releases, and commutes his rights, which effect is not only completely and absolutely contrary to the provisions of § 303(a)(1) of the SSA but also denies such claimant access to his rightful procedural due process. *California Department of Human Resources Development v. Java*, 402 U.S. 121, 91 S.Ct. 1347 (1971). If such claimants were non-union and had filed claims after the expiration of the contract of hire due to failure to agree to new terms of hire, such claims would have been examined by the courts differently to fully determine if such separation was a qualifying discharge or leaving under the respective disqualifying provisions for separation from employment. The same legal examination should be equally provided by the State courts to the union worker upon unemployment at termination of his employment contract. Otherwise, the union worker is penalized by the State courts for his affiliation and choice of affiliation by automatic disqualification under the state labor-dispute provision. The clear intent of such disqualification is found in the language of the state statute itself, wherein the unemployment must be "due to a labor dispute". In the matter at hand, the unemployment of the union workers was due to an expired employment contract and the parties have not reached agreement as to terms of a new contract; therefore, review should have fallen rather

under the other disqualifying provisions of LSA-R.S. 23:1601 for review as to qualification.

The disqualification statute for labor dispute, would not violate any constitutional rights of equal protection, if its very language, as written, were recognized and abided by the State courts. LSA-R.S. 23:1472(12)(A); LSA-R.S. 23:1472(19)(a); LSA-R.S. 23:1601(4). Where a union worker discontinues performance of work during the term of employment, then such statutory disqualification is applicable and would not result in any unfair treatment of the union worker. In such manner, both the non-union claimant and the union claimant would be equally treated under the same factual analysis of cause of separation, for purposes of unemployment compensation.

This failure by the State court to distinguish the separate bodies of law has further amplified the violation of constitutional rights of equal protection and procedural due process of the union claimant. For unemployment compensation purposes, the expiration of the contract of hire is recognized for the non-union claimant and should, therefore, be consistently recognized and reviewed for the equal and fair treatment and procedural due process of the union claimant.

4.

INFRINGEMENT OF STANDARDS OF PROMPT PAYMENT

***Java*, 402 U.S. 121, 91 S.Ct. 1347 (1971)**

If FUTA is to be applied under NLRA dictates and the lengthy wait for National Labor Relations Board

(NLRB) decisions, the very purpose of prompt payment required of State unemployment compensation programs under *California Department of Human Resources Development v. Java*, 402 U.S. 121, 91 S.Ct. 1347 (1971) is denied. In *Java*, the Supreme Court held that the words "when due" in § 303(a)(1) of the SSA meant "at the earliest stage of unemployment that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard." Also, LSA-R.S. 23:1635. Expiration of contract under a claim of a union claimant should be administered and processed in equal treatment of expiration of contract of any non-union claimant; otherwise, any delay of processing of such claim of a union claimant results in violation of the "prompt payment" rule under the SSA on the basis of unfair distinction of class of claimant. In the case at bar, the union claimants made initial claims immediately after expiration of contract and thus an equal treatment with any non-union claimant, payment of unemployment compensation was promptly due upon examination of claim for cause of separation and application of the concepts of definitions of "employment" and "unemployment" for unemployment compensation purposes. Under the State court rationale, a union claimant is never unemployed. The severing of the employment relationship was not only demonstrated by the expiration of contract but also revealed on record by the employer that positions for such union claimants were only available upon vacancy. (See Appendix – Board of Review.) Investigation by the Louisiana Department of Labor resulted in inability to determine which, if any, positions were available. Yet, the State court refused to recognize such clear evidence of

severance of the employment relationship on the mere basis that the claimants were union employees.

5.

FUTURE RISK OF MISINTERPRETATION OF FEDERAL CONSTITUTIONAL AND STATUTORY LAW

As a result, the following federal statutory and constitutional provisions are at risk of future misinterpretation, misapplication, or non-application: U.S. Const. amends. 5 and 14; 26 U.S.C. 3301 et seq. (Federal Unemployment Tax Act); 29 U.S.C. 141 et seq. (Labor Management Relations Act); 29 U.S.C. 151 et seq. (National Labor Relations Act); 42 U.S.C. 501 et seq. (Social Security Act).

The LDOL is mandated to enforce a manifestly erroneous State court interpretation of federal statutory law which adversely impacts the public interest in the administration of the State unemployment compensation program in an unconstitutional manner. 42 U.S.C. 1983 et seq. The State courts have committed gross and manifest error by violating the provisions of FUTA and SSA, the sole governing bodies of federal law for administration of any State unemployment compensation program, through application of the concept of definition of "employee" under the National Labor Relations Act (NLRA), rather than the concepts of definitions of "employment" and "unemployment" under FUTA and SSA, for determination of benefits under such program for union-affiliated claimants. 29 U.S.C. 152; 26 U.S.C. 3306.

6.

UNLAWFUL ADMINISTRATION OF STATE UNEMPLOYMENT COMPENSATION PROGRAM

Unlawful Denial of Benefits to the Union Worker

If the decisions of the State courts stand, the Petitioner will be left to administer an unemployment compensation program that will be unlawfully and unconstitutionally restricted to ask only (1) whether the claimant is a member of a union and (2) whether the work of such claimant and his union-affiliated cohorts is discontinued. 42 U.S.C. 1983 et seq. It will be of no moment for the Petitioner to delve further to determine other facts (i.e. cause of unemployment, status of contract of hire), as is inquired of any non-union claimant. Disqualification of a union-affiliated claimant will be automatic where the work of such claimant is discontinued. The U.S. Constitution, as well as the SSA and FUTA, the sole governing bodies of federal law for administration and certification of any State unemployment compensation program, will have no bearing upon an unemployment compensation claim and provide no equal protection to a particular class of workers, that being the union-affiliated workers. The definition of "employee" under the National Labor Relations Act (NLRA), a body of federal law that is separate and distinct from SSA and FUTA, rather than the concepts of definitions of "employment" and "unemployment" under SSA and FUTA, for determination of benefits under such program for a judicially created class of union-affiliated claimants will be applied. 29 U.S.C. 152; 26 U.S.C. 3306.

7.

UNLAWFUL ADMINISTRATION OF UNEMPLOYMENT COMPENSATION PROGRAM

Outcome for the Union Worker

If this Court denies review of the State court, LDOL must enforce a judgment by the State courts that, *for unemployment compensation qualification purposes*, provides that:

> a. expiration of contract of employment is irrelevant for determination of an unemployment compensation claim as to cause of unemployment for union workers (but not irrelevant for non-union workers).
>
> b. the concepts of definitions of "employment" and "unemployment" and questions as to whether claimant is performing services for remuneration are to be ignored when a union worker files an unemployment compensation claim.
>
> c. the provisions of the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA), the sole governing bodies of federal law for administration and certification of any State unemployment compensation program, for concepts of definitions of "employment" and "unemployment", which require performance of services for remuneration, are disregarded, and instead the concepts under the definition of "employee" and "strike" under the National Labor Relations Act (NLRA), a body of federal law that is separate and distinct from FUTA and SSA and which does not require performance of services for remuneration, is applied for determination of benefits under such program for union-affiliated claimants.

CONCLUSION

The petition for a writ of certiorari should be granted, as the State court has decided an important question of federal law which has not, but should be settled by this Court and which conflicts with constitutional and statutory law.

Respectfully submitted,

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APPENDIX

STATE OF LOUISIANA
APPEALS TRIBUNAL
FOR THE
OFFICE OF EMPLOYMENT SECURITY
POST OFFICE BOX 94094
BATON ROUGE, LOUISIANA 70804

DECISION OF ADMINISTRATIVE LAW JUDGE

CLAIMANT	EMPLOYER
HARRY ABADIE, JR. ROUTE 2, BOX 1145 RESERVE, LA 70084	BAYOU STEEL CORPORATION P. O. BOX 5000 LAPLACE, LA 70069

DOCKET NUMBER:	H 550 AT 93
S.S. NUMBER:	435 27 3290
AREA OFFICE:	LAPLACE
APPEAL FILED:	MAY 11, 1993
DECISION MAILED:	JULY 9, 1993

ISSUE

DISQUALIFICATION FOR BENEFITS –
R. S. 23: 1601 (2) and 1601 (4)

CASE HISTORY

The Louisiana Office of Employment Security determined on April 21, 1993, that the claimants were disqualified from receipt of unemployment insurance benefits

effective March 21, 1993. The Agency issued redeterminations on May 4, 1993, reversing the disqualification and allowing benefits effective March 20, 1993, because " . . . additional available information indicate[d] that work may not be available . . . " at the place of employment. From these redeterminations, the employer appealed.

The Administrative Law Judge conducted a hearing in the Job Service Office in Metairie, Louisiana, on Monday, May 24, 1993. Mr. H. Mark Adams and Mr. Howard E. Sinor, Jr., attorneys, represented the employer-appellant. Mr. Jon Flanagan, Director of Risk Management, Compensation and Benefits, appeared as a witness for the company and offered testimony. Mr. Louis L. Robein, Jr., attorney, represented the claimants. Mr. Ronald Ferraro, Mr. Kinley Porter and Mr. James Pepitone appeared as potential witnesses.

The hearing reconvened on Wednesday, May 26, 1993, in the Job Service Office in Metairie, Louisiana. The same persons were present with the addition of Mr. Henry Vasquez, Vice-President for Human Resources, who appeared to testify for the employer-appellant. Mr. Ronald Ferraro also testified.

The hearing reconvened on Monday, June 14, 1993, in the Job Service Office in Metairie, Louisiana. The same persons were present. In addition, Mr. Patrick Gaffney, Vice-President and staff attorney for Hibernia National Bank, was present to file a motion to quash a witness subpoena and a subpoena duces tecum issued to Mr. S. John Castellano, Vice-President of Hibernia National Bank. The

employer-appellant joined in the motion. The Administrative Law Judge did not rule on the motion but simply agreed to reissue the subpoenas in accordance with banking statutes governing subpoenas for bank officials and bank documents. Mr. Ronald Ferraro testified again.

The hearing reconvened on Monday, June 28, 1993, in the Job Service Office in Metairie, Louisiana. The same persons were present with the addition of Mr. S. John Castellano, Vice-President for Commercial Banking for Hibernia National Bank, who testified.

All parties had received written notice that an additional issue would be considered, that being whether claimants were discharged from employment and whether discharge was for misconduct connected with the employment pursuant to the provisions of R. S. 23: 1601 (2).

Since ten days written notice of the hearing date and location and the issues was not given, both parties agreed to waive the right to ten days written notice.

FINDINGS OF FACT

The claimants were all employed in various capacities by the named employer at their location in La Place, Louisiana, under a bargaining agreement between the employer and the United Steelworkers of America, AFL-CIO-CLC (USWA) (hereafter referred to as "the union"). Most of them had worked the full six-year term of the agreement effective March 1, 1987, through February 28, 1993.

Discussions regarding a new contract began on January 15, 1993. After two months of negotiations, the claimants

authorized the union bargaining committee on February 24, 1993, to call a strike if an agreement could not be reached, and the union promptly advised the employer of the vote in favor of a strike. The union agreed to give the employer 48 hours notice of a called strike.

Negotiations continued, but no settlement was reached. On March 19, 1993, the union advised the employer that it would begin a strike on March 21, 1993.

On March 20, 1993, the employer made another offer which they considered their "last ditch" effort to avert a strike. They informed the union that *if* the offer was rejected by the membership, the employer would determine that impasse had been reached and that the conditions of the March 19, 1993, offer would be imposed. Without even presenting it to the membership for a vote, the union bargaining committee advised the employer that the offer was rejected and that the strike would proceed.

The employer, through conversations between company officials Richard Gonzalez and Howard Myers and banking officer John Castellano, advised Hibernia National Bank that there was no need to worry about their outstanding loans even though the employer had lost several million dollars in the last two years. They indicated that they could run the plant with new hires and returning strikers until a settlement could be reached. Mr. Castellano gathered from these conversations that new hires were not going to be terminated at the end of the strike, but he did not know what plans the employer had for deciding which returning strikers would be put back to work. In addition, he gathered from several of these

conversations that the employer hoped to negotiate a contract which would result in increased productivity and would cause the company to achieve about four million dollars in profit during the next year.

The strike began on March 21, 1993. All of the claimants have participated in the strike by refusing to return to work and by walking the picket lines. Some of the union members did not go out on strike, and a few have crossed the picket lines and returned to work. About 122 strike replacement workers have been hired and are also crossing the picket lines to work. They have been told by the employer that they have low seniority status and are subject to being replaced by claimants when the strike ends. All of the workers are being paid and are receiving benefits in accordance with the expired labor contract. Although the employer threatened to declare impasse and impose the conditions of the March 19, 1993, offer, they have not done so.

While it is possibly the intention of the employer to discharge some strikers who are considered to have acted inappropriately on the picket lines, no criteria for these dismissals has been developed, and no workers have been discharged.

OPINION

R.S. 23:1601 (2) provides that an individual shall be disqualified for benefits (a) if the Administrator finds that he has been discharged by a base period or subsequent employer for misconduct connected with his employment. Misconduct means mismanagement of a position of employment by action or inaction, neglect that places in

> jeopardy the lives or property of others, dishonesty, wrongdoing, violation of a law a violation of a policy or rule adopted to insure orderly work or the safety of others. Such disqualification shall continue until such time as the claimant can requalify by demonstrating that he: (i) has been paid wages for work subject to the Louisiana Employment Security Law or to the unemployment insurance laws of any other state or of the United States equivalent to at least ten times his weekly benefit amount following the week in which the disqualifying separation occurred and (ii) that he has not left his last work under disqualifying circumstances.

No employees have been discharged or permanently replaced by new hires. No allegations of any misconduct has been made by the employer. This section of law does not apply and cannot be used to disqualify the claimants for unemployment insurance benefits.

While I personally believe that workers who have been permanently replaced by strike replacements should not be disqualified for unemployment insurance benefits, the Louisiana courts have consistently rejected this idea. *Associated Grocers, Inc. v. Administrator,* 496 So. 2d 450, 452 La. App. 1st Cir.) *writ denied,* 497 So. 2d 1389 (La. 1986); *Standard Materials, Inc., v. Administrator, Div. of Employment Security, Department of Labor,* 401 So. 2d 400, 401 (La. App. 1st Cir. 1981).

> R.S. 1601 (4) provides that an individual shall be disqualified for benefits for any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was

> last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment. For the purpose of this Subsection, if separate branches of work which are commonly conducted as separate business in separate premises, are conducted in separate departments of the same premises, each such department shall be deemed to be a separate factory, establishment or other premises.

The claimants are actively participating in a labor dispute at their place of employment. They are certainly interested in the outcome of the labor dispute. *Vancouver Plywood Co., Inc., v. Sumrall,* 415 So. 2d 625 (La. App. 3d Cir. 1982); *Senegal v. Lake Charles Stevedores, Inc.,* 197 So. 2d 648 (La. 1967).

Negotiations toward a contract continue. Impasse has not been declared. The employer has not unilaterally imposed any new working conditions, rates of pay or benefit schedules on those workers who continue employment, union members or not. The conditions which occurred in *Greyhound Lines, Inc., v. Strong,* No. 79525, 22d JDC (La. Dist. Ct., August, 1985) are not present in this case.

The claimants have not been locked out of the plant, so they cannot claim that exemption from the labor dispute disqualification. *National Gypsum Company v. Administrator,* 313 So 2d 230, 233 (La. 1975).

The evidence adduced at the hearing(s) clearly shows that the Agency redetermination is in error and that the

claimants must be disqualified for unemployment insurance benefits.

IT IS ORDERED That, since R. S. 23: 1601 (2) does not apply, no disqualification for unemployment insurance benefits be assessed under this section of law.

IT IS FURTHER ORDERED That the Agency redeterminations which did not disqualify the claimants for unemployment insurance benefits pursuant to the provisions of R. S. 23: 1601 (4) be reversed and the claimants disqualified effective March 21, 1993.

/s/ Dennis W. Dykes, Sr.
DENNIS W. DYKES, SR.
CHIEF ADMINISTRATIVE
LAW JUDGE

dwd

REOPENING OF HEARING: IF EITHER PARTY FAILS TO APPEAR FOR A HEARING, THE JUDGE *MAY*, UPON GOOD CAUSE SHOWN, REOPEN AND RESCHEDULE THE HEARING. THE REQUEST MUST BE IN WRITING AND MAILED OR DELIVERED TO THE OFFICE WHERE THE APPEAL WAS FILED OR TO THE JUDGE WHOSE NAME AND ADDRESS APPEAR ON THE NOTICE OF HEARING WITHIN SEVEN (7) DAYS OF THE DATE THE DECISION OF THE JUDGE WAS MAILED. IF THE REQUEST IS DENIED, IT WILL *NOT* BE FORWARDED TO THE LOUISIANA BOARD OF REVIEW AS AN APPEAL TO THE DECISION OF ADMINISTRATIVE LAW JUDGE.

FURTHER APPEAL RIGHTS: THIS DECISION BECOMES FINAL UNLESS AN APPEAL IS FILED WITH

THE LOUISIANA BOARD OF REVIEW, P. O. BOX 94094, BATON ROUGE, LOUISIANA 70804-9094, OR WITH THE LOCAL EMPLOYMENT SECURITY OFFICE IN YOUR AREA WITHIN FIFTEEN (15) DAYS AFTER THE MAILING DATE SHOWN. THE APPEAL SHOULD LIST DETAILED REASONS WHY IT IS BELIEVED THAT THE DECISION OF THE ADMINISTRATIVE LAW JUDGE IS INCORRECT. IF YOU EXERCISE FURTHER APPEAL RIGHTS, CONTINUE TO FILE YOUR CLAIM FOR BENEFITS WEEKLY.

STATE OF LOUISIANA

BOARD OF REVIEW
FOR THE
OFFICE OF EMPLOYMENT SECURITY
POST OFFICE BOX 94094
BATON ROUGE, LOUISIANA 70804-9094

DECISION OF BOARD OF REVIEW

CLAIMANT	EMPLOYER
Ferraro Ronald et al 133 Somerset LaPlace, LA 70068-5209	Bayou Steel Corporation P. O. Box 5000 LaPlace, LA 70069

S.S.NUMBER: 439 82 4936

BOARD DOCKET NUMBER:	1904 BR 93
APPEALS DOCKET NUMBER:	H 0550 AT 93
AREA OFFICE:	LaPlace
APPEAL FILED DATE:	MAY 11, 1993
DECISION MAILED:	AUG 04 1993

ISSUES

DISQUALIFICATION FOR BENEFITS – R.S.23:1601(4)
DISQUALIFICATION FOR BENEFITS – R.S.23:1601(2)

CASE HISTORY

This case came before the Louisiana Board of Review upon an appeal timely filed by the claimants, through their legal representative, Louis L. Robein, Jr. The appeal is a result of a decision rendered by Chief Administrative Law Judge Dennis W. Dykes, Sr., on July 9, 1993. In his decision, Judge Dykes ordered that LSA-R.S. 23:1601(2)

did not apply to the case, and there should be no disqualification assessment pursuant to that Section of Law. Judge Dykes further ordered that the redeterminations issued by the Agency, which did not disqualify the claimants for unemployment insurance benefits pursuant to LSA-R.S. 23:1601(4) be reversed, and the claimants be disqualified for benefits effective March 21, 1993.

EVIDENCE

The claimants worked for the employer under a bargaining agreement between the employer and the United Steelworkers of America, AFL-CIO-CLC (USWA) (hereafter referred to as "the union"). Most of the claimants worked the full six-year term of the agreement, March 1, 1987 through February 28, 1993.

Discussions regarding a new contract began January 15, 1993. A strike authorization vote was given by the union membership on February 24, 1993. The union notified the employer of the strike authorization vote. The employer made preparations in case a strike occurred; those preparations included planning to hire replacements for striking employees.

The contract was to have expired on February 28, 1993; however, the union and employer agreed to two (2) extensions of the contract, through March 20, 1993. Negotiations continued; a settlement could not be reached.

March 19, 1993 the union and company met. The union refused to agree to another extension of the expiring contract; the union did agree to give the employer 48 hours notice of a called strike. Approximately two hours

later, the union advised the employer that it would begin a strike on March 21, 1993.

March 20, 1993 the employer made a "last ditch" offer in an effort to avert a strike. They informed the union that if the offer was rejected by the membership, the employer would determine that an impasse had been reached and that the conditions of the March 19, 1993 offer would be imposed. The union bargaining committee, having been authorized by the membership vote on February 24, 1993, rejected the offer and advised the employer that the strike would proceed. An impasse was not declared.

The strike began March 21, 1993. All of the claimants have participated in the strike by refusing to return to work and/or by walking the picket lines.

Some of the union members did not go out on strike, but rather reported for work immediately as scheduled. Some of the union members who did initially participate in the strike by refusing to work, have since crossed the picket lines and returned to work. Approximately 122 strike replacement workers have been hired and are also crossing the picket lines to work.

The employer has not unilaterally imposed new working conditions. The employer is voluntarily adhering to the expired contract in rates of pay, benefit schedules, etc., on those workers who continue employment, union or not. Claimant Ferraro asserts that the employer is sub-contracting truck driver jobs (approximately 24 jobs affected) in violation of the expired contract.

OPINION

R.S.23:1601(2) provides that an individual shall be disqualified for benefits if the Administrator finds that he has been discharged by a base period or subsequent employer for misconduct connected with his employment. Such disqualification shall continue until such time as the claimant (a) can demonstrate that he has been paid wages for work subject to the Louisiana Employment Security law or to the unemployment insurance laws of any other state or of the United States equivalent to at least ten times his weekly benefit amount following the week in which the disqualifying act occurred and (b) has not left his last work under disqualifying circumstances. In addition, if the administrator finds that such misconduct has impaired the right, damaged or misappropriated the property of, or has damaged the reputation of a base period employer, then the wage credits earned by the individual with the employer shall be canceled, and no benefits shall be paid on the basis of wages paid to the individual by such employer.

R.S.23:1601(4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment. For the purposes of this Subsection, if separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the

same premises, each such department shall be deemed to be a separate factory, establishment or other premises.

There is no testimony or evidence indicating that the claimants have been "discharged" from their employment. Rather, the record indicates that former "strikers" have returned to work with this employer. In accordance with federal law, they continue to have the right to reinstatement upon application, as jobs become available. *National Labor Relations Board v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 88 Sup.Ct. 543, 19 L.Ed2d 614 (1967).

There is no testimony or evidence indicating that the claimants have "quit" their employment with Bayou Steel Corp., as alleged in their memorandum to the Board of Review. To the contrary, the claimants have provided written statements indicating that they are unemployed as a result of a labor dispute. This is substantiated by the testimony of Claimant Ferraro who stated " . . . we had no alternative but to go on strike . . . " Further, the employer has received no notices of resignation, nor has the Department of Labor (agency) been advised by these claimants that they have subsequently "quit".

The Unemployment Act is not intended to encourage idleness or labor disputes nor to force an employer to contribute benefits to help finance his employees' disputes with him. Only an employee prevented from working through no fault of his own should be entitled to unemployment benefits. Thus, the disqualification provision of LSA-R.S. 23:1601 (4) must be regarded as an expression of public policy that the State remain neutral in labor disputes. The award or denial of unemployment compensation should not be available as a weapon to

either labor or management, as they seek to resolve their differences. See *Piggly Wiggly v. Gerace,* 370 So. 2d 1327 (La. App. 2d Cir. 1979).

The Louisiana Employment Security Law requires the employer to pay substantial sums into a fund from which unemployment compensation benefits are paid. The employee contributes nothing to this fund. Avoiding placing an employer in a position of being compelled by statute to subsidize a strike undoubtedly was one of the reasons which prompted the Legislature to disqualify those who are participating in or interested in a labor dispute, and we consider that a broad disqualification was intended by those categories. See *Senegal v. Lake Charles Stevedores, Inc.,* 197 So. 2d 648 (La. 1967).

The burden is on the employee to prove that he comes within the exceptions to disqualification by showing that he is neither participating in nor interested in the dispute. See *Senegal v. Lake Charles Stevedores, Inc.,* 197 So. 2d 648 (La. 1967).

In this case, the claimants refused to accept an extension of the expiring contract. An extension would have allowed them to continue working as they had for the prior six year period, while negotiations of a new contract continued. Rather, the claimants elected to strike. There has been no lockout, nor has there been an impasse.

Due to the aforementioned, it must be concluded that the claimants are unemployed as a result of a labor dispute in active progress at the premises at which they were last employed. Further, as the claimants continue in their refusal to cross the picket lines and their refusal to

return to work, it must be concluded that these claimants are participating in and interested in the labor dispute. For these reasons, the claimants are not entitled to Unemployment Insurance Benefits.

IT IS ORDERED that the decision of the Administrative Law Judge, assessing a disqualification for benefits pursuant to LSA-R.S. 23:1601(4), effective March 21, 1993, be affirmed.

LOUISIANA BOARD OF REVIEW

/s/ Gordon Flory
GORDON FLORY, CHAIRMAN

/s/ Basil Ball
BASIL BALL,
VICE-CHAIRMAN

/s/ Emery Villar
EMERY VILLAR,
BOARD MEMBER

/s/ Herman Muse
HERMAN MUSE,
SECRETARY

DID NOT PARTICIPATE
IN THIS DECISION
RAY FREDLUND,
BOARD MEMBER

fd

FURTHER APPEAL RIGHTS: This decision becomes final unless an appeal is filed in the district court in the parish where the claimant resides, or last resided, within fifteen (15) days after the mailing date of this decision. If you exercise further appeal rights and are unemployed, continue to file your claim for benefits weekly.

HARRY ABADIE, JR. et al.

versus

BAYOU STEEL CORPORATION et al.

40TH JUDICIAL DISTRICT COURT

PARISH OF ST. JOHN THE BAPTIST

STATE OF LOUISIANA

NO. 31,262, DIVISION C

JUDGMENT

(Filed Dec. 28, 1993)

This matter was submitted for decision, in accordance with the court's order of December 6, 1993, at 5 p.m. December 20, 1993, with leave nevertheless to file additional briefs by 2 p.m. December 23, and additional briefs were filed. Counsel for the parties were Louis L. Robein, Jr. for claimants; Howard B. Sinor, H. Mark Adams and Katy Kimbell Theriot for the employer; and Denise A. Nagel and Virginia Gerace Benoist for the Secretary of Labor.

For the written reasons this day assigned,

IT IS ORDERED, ADJUDGED, AND DECREED that the decision of the Louisiana Board of Review is AFFIRMED.

Judgment rendered and signed at Edgard, Louisiana, December 28, 1993.

/s/ William V Redmann
WILLIAM V. REDMANN,
JUDGE AD HOC

HARRY ABADIE, JR. et al.	40TH JUDICIAL DISTRICT COURT
versus	PARISH OF ST. JOHN THE BAPTIST
BAYOU STEEL CORPORATION et al.	STATE OF LOUISIANA
	NO. 31,262, DIVISION C

REASONS FOR JUDGMENT

(Filed Dec. 28, 1993)

Harry Abadie, Jr. and others apply for judicial review to reverse a decision of the Louisiana Board of Review affirming their disqualification for unemployment insurance benefits. That disqualification had been determined by Chief Administrative Law Judge Dennis W. Dykes, Sr., reversing an administrative redetermination that had held applicants not disqualified by La. R.S. 23:1601(4).

La. R.S. 23:1634 provides for judicial review of the Board's decisions, and it specifies that in any such judicial review,

> "the findings of the Board of Review as to the facts, if supported by sufficient evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law."

I have read the entire 390-page transcript of the testimony before the administrative law judge, and have considered the many exhibits and administrative records referred to therein. I have also studied at length the very thoughtful memoranda submitted by counsel for the claimants, for the employer, and for the Secretary of Labor, together with additional memoranda in response.

I conclude that there is sufficient evidence for the Board's findings of fact, and that those findings are therefore conclusive, as the quoted law provides.

I also conclude that the Board correctly applied the law on disqualification for benefits, namely La. R.S. 23:1601. That law disqualifies a claimant

> "(4) For any week with respect to which . . . his unemployment is due to a labor dispute in active progress at the . . . premises at which he is or was last employed; but such disqualification shall not apply if it is shown . . . that he is not participating in or interested in the labor dispute which caused his unemployment."

Considering the Board's sufficiently supported findings that claimants' unemployment was due to the labor dispute in progress and that claimants have not shown that they are not participating in or interested in that labor dispute, and considering the plain language of the quoted law, and considering but notwithstanding the thorough and insightful arguments to the contrary by the claimants and by the Secretary, this court concludes it has no alternative on judicial review but to affirm the Board's decision.

Edgard, Louisiana, December 28, 1993.

/s/ William V Redmann
WILLIAM V. REDMANN,
JUDGE AD HOC

HARRY ABADIE, JR., ET AL	40TH JUDICIAL DISTRICT COURT
VS. NO. 31,262 DIVISION "C"	PARISH OF ST. JOHN THE BAPTIST
BAYOU STEEL CORPORATION, ET AL	STATE OF LOUISIANA

YOU ARE HEREBY NOTIFIED that on the 28th day of December, 1993, Judgment was rendered in the above numbered and entitled matter, a certified copy of which said Judgment is annexed hereto and made part hereof.

WITNESS MY OFFICIAL HAND AND SEAL OF OFFICE AT EDGARD, LOUISIANA ON THIS 3rd DAY OF January, 1994.

/s/ Lynn D. Caronna
DY. CLERK OF COURT

I hereby certify that a copy of the foregoing notice was this day mailed by me to the following counsel of record for all parties and to such of the litigants, if any, who are not represented by counsel which notices were addressed to them, respectively at their last known address, with postage prepaid.

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/s/ Lynn D. Caronna
DY. CLERK OF COURT

HARRY ABADIE, JR., ET AL.	NO. 94-CA-322
VERSUS	COURT OF APPEAL
BAYOU STEEL CORPORATION AND HONORABLE GAYLE F. TRULY, SECRETARY OF LABOR	FIFTH CIRCUIT STATE OF LOUISIANA

APPEAL FROM THE FORTIETH JUDICIAL DISTRICT COURT PARISH OF ST. JOHN THE BAPTIST, STATE OF LOUISIANA
NO. 31, 262, DIVISION "c"
HONORABLE WILLIAM REDMANN

JOHN C. BOUTALL
JUDGE PRO TEMPORE

OCTOBER 25, 1994

Court composed of Judges Thomas C. Wicker, Jr., James L. Cannella and John C. Boutall, Pro Tempore

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AFFIRMED.

This case involves claims for unemployment compensation. The plaintiffs are employees of Bayou Steel Corporation. They filed suit in the 40th Judicial District to contest a determination by the Administrative Review Board that they were excluded from collecting benefits under La. R.S. 23:1601(4) as active members of a strike. Named as defendants in the suit were Bayou Steel and Honorable Gayle F. Truely, Secretary of Labor. The decision of the Review Board was affirmed by the trial court and both the plaintiffs and the Honorable Gayle F. Truely have appealed to this court for review. We likewise affirm the decision of the review panel.

The plaintiffs are employees of Bayou Steel Corporation and members of the United Steel Workers of America. These employees were working under a six year contract which expired on February 28, 1993. The union and the company failed to successfully negotiate a new contract and the union called a strike which began on March 21, 1993. All of the claimants herein have participated in the strike by refusing to return to work and/or walking the picket line.

In April of 1993, the employees filed their claims for unemployment compensation. Bayou Steel opposed the claims, alleging that claimants were disqualified from

receiving benefits under La. R.S. 23:1601(2) (employee misconduct) and La. R.S. 23:1601(4) (employees who are actively participating in or who are interested in an ongoing labor dispute). On April 21, 1993, the Administrator made an initial determination disqualifying claimants from receiving benefits. Subsequently, on May 4, 1993, the Administrator issued a Non-monetary Determination which reversed his prior decision and found that the claimants were entitled to unemployment benefits.

Bayou Steel Corporation appealed and the matter was presented to Administrative Law Judge Dennis Dykes. After a hearing, he found that La. R.S. 23:1601(2) was inapplicable to this case. He further found that claimants were actively participating in an ongoing strike and therefore they were disqualified from receiving benefits under La. R.S. 23:1601(4).

The claimants appealed to the Board of Review, which affirmed the decision of the Administrative Law Judge. The board articulated its findings of fact and applications of law as follows:

> The claimants worked for the employer under a bargaining agreement between the employer and the United Steelworkers of America, AFL-CIO-CLC (USWA) (hereafter referred to as "the union"). Most of the claimants worked the full six-year term of the agreement, March 1, 1987 through February 28, 1993.
>
> Discussions regarding a new contract began January 15, 1993. A strike authorization vote was given by the union membership on February 24, 1993. The union notified the employer of the strike authorization vote. The employer

made preparations in case a strike occurred; those preparations included planning to hire replacements for striking employees.

The contract was to have expired on February 28, 1993; however, the union and employer agreed to two (2) extensions of the contract, through March 20, 1993. Negotiations continued; a settlement could not be reached.

March 19, 1993 the union and company met. The union refused to agree to another extension of the expiring contract; the union did agree to give the employer 48 hours notice of a called strike. Approximately two hours later, the union advised the employer that it would begin a strike on March 21, 1993.

March 20, 1993 the employer made a "last ditch" offer in an effort to avert a strike. They informed the union that if the offer was rejected by the membership, the employer would determine that an impasse had been reached and that the conditions of the March 19, 1993 offer would be imposed. The union bargaining committee, having been authorized by the membership vote on February 24, 1993, rejected the offer and advised the employer that the strike would proceed. An impasse was not declared.

The strike began March 21, 1993. All of the claimants have participated in the strike by refusing to return to work and/or by walking the picket lines.

Some of the union members did not go out on strike, but rather reported for work immediately as scheduled. Some of the union members who did initially participate in the strike by refusing to work, have since crossed the picket

lines and returned to work. Approximately 122 strike replacement workers have been hired and are also crossing the picket lines to work.

The employer has not unilaterally imposed new working conditions. The employer is voluntarily adhering to the expired contract in rates of pay, benefit schedules, etc., on those workers who continue employment, union or not. Claimant Ferraro asserts that the employer is sub-contracting truck driver jobs (approximately 24 jobs affected) in violation of the expired contract.

OPINION

R.S. 23:1601(2) provides that an individual shall be disqualified for benefits if the Administrator finds that he has been discharged by a base period or subsequent employer for misconduct connected with his employment. Such disqualification shall continue until such time as the claimant (a) can demonstrate that he has been paid wages for work subject to the Louisiana Employment Security law or to the unemployment insurance laws of any other state or of the United States equivalent to at least ten times his weekly benefit amount following the week in which the disqualifying act occurred and (b) has not left his last work under disqualifying circumstances. In addition, if the administrator finds that such misconduct has impaired the right, damaged or misappropriated the property of, or has damaged the reputation of a base period employer, then the wage credits earned by the individual with the employer shall be cancelled, and no benefits shall be paid on the

basis of wages paid to the individual by such employer.

R.S. 23:1601(4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment. For the purposes of this Subsection, if separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall be deemed to be a separate factory, establishment or other premises.

There is no testimony or evidence indicating that the claimants have been "discharged" from their employment. Rather, the record indicates that former "strikers" have returned to work with this employer. In accordance with federal law, they continue to have the right to reinstatement upon application, as jobs become available. *National Labor Relations Board v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 88 Sup.Ct. 543, 19 L.Ed.2d 614 (1967).

There is no testimony or evidence indicating that the claimants have "quit" their employment with Bayou Steel Corp., as alleged in their memorandum to the Board of Review. To the contrary, the claimants have provided written statements indicating that they are unemployed as a result of a labor dispute. This is substantiated by the testimony of Claimant Ferraro who

stated " . . . we had no alternative but to go on strike . . . " Further, the employer has received no notices of resignation, nor has the Department of Labor (agency) been advised by these claimants that they have subsequently "quit".

The Unemployment Act is not intended to encourage idleness or labor disputes nor to force an employer to contribute benefits to help finance his employees' disputes with him. Only an employee prevented from working through no fault of his own should be entitled to unemployment benefits. Thus, the disqualification provision of LSA-R.S. 23:1601 (4) must be regarded as an expression of public policy that the State remain neutral in labor disputes. The award or denial of unemployment compensation should not be available as a weapon to either labor or management, as they seek to resolve their differences. See *Piggly Wiggly v. Gerace*, 370 So. 2d 1327 (La. App. 2d Cir. 1979).

The Louisiana Employment Security Law requires the employer to pay substantial sums into a fund from which unemployment compensation benefits are paid. The employee contributes nothing to this fund. Avoiding placing an employer in a position of being compelled by statute to subsidize a strike undoubtedly was one of the reasons which prompted the Legislature to disqualify those who are participating in or interested in a labor dispute, and we consider that a broad disqualification was intended by those categories. See *Senegal v. Lake Charles Stevedores, Inc.*, 197 So. 2d 648 (La. 1967).

The burden is on the employee to prove that he comes within the exceptions to disqualification by showing that he is neither participating

in nor interested in the dispute. See *Senegal v. Lake Charles Stevedores, Inc.*, 197 So. 2d 648 (La. 1967).

In this case, the claimants refused to accept an extension of the expiring contract. An extension would have allowed them to continue working as they had for the prior six year period, while negotiations of a new contract continued. Rather, the claimants elected to strike. There has been no lockout, nor has there been an impasse.

Due to the aforementioned, it must be concluded that the claimants are unemployed as a result of a labor dispute in active progress at the premises at which they were last employed. Further, as the claimants continue in their refusal to cross the picket lines and their refusal to return to work, it must be concluded that these claimants are participating in and interested in the labor dispute. For these reasons, the claimants are not entitled to Unemployment Insurance Benefits.

These findings were affirmed by the 40th Judicial District Court. In its reasons for judgment, the trial court stated:

Considering the Board's sufficiently supported findings that claimants' unemployment was due to the labor dispute in progress and that claimants have not shown that they are not participating in or interested in that labor dispute, and considering the plain language of the quoted law, and considering but notwithstanding the thorough and insightful arguments to the contrary by claimants and by the Secretary, this court concludes it has no alternative on

judicial review but to affirm the Board's decision.

Both the claimants and the Department of Labor, through its Secretary, the Honorable Gayle F. Truely allege that the evidence is insufficient to support the decision of the Board of Review and that the decision is incorrect as a matter of law. Both further request that, in the alternative, this matter should be remanded for the taking of evidence on matters which occurred after the hearing before Administrative Law Judge Dykes. In addition, the Department of Labor argues that the present state jurisprudence violates state statutory and constitutional law; jeopardizes public policy and favors an exclusive remedy in favor of the employer against the employee.

At the onset, it is important to note the standard of review by which we are bound in matters of this kind. La. R.S. 23:1634 provides in part that "In any proceeding under this section the findings of the board of review as to the facts, if supported by sufficient evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law."

There must be legal and competent evidence to support the factual findings on which the administrative determination turns. *Banks v. Administrator of Dept. of Labor,* 393 So.2d 696 (La. 1981). Judicial review of the findings of the Board of Review does not permit the weighing of evidence, drawing of inferences, reevaluation of evidence or substituting the views of the court for that of the Board of Review as to the correctness of the

facts presented. *Dupont v. Blanche*, 514 So.2d 286 (La.App. 5 Cir.1987).

In this case, after a careful review of the record, we believe that the findings of the review panel are supported by sufficient evidence and, therefore, we are bound by these findings. Plaintiffs allege that company actions threatening new working conditions, reductions in pay and termination of an undisclosed number of employees for strike misconduct constituted a "lock out" thereby making them eligible for unemployment benefits. The Board of Review found, however, that these changes were not made and that the plant was currently working under the terms of the expired contract pending a resolution of the labor dispute, and the actions of Bayou Steel did not constitute a lockout.

Plaintiffs and the Department of Labor also argue that Bayou Steel's actions in hiring replacement workers for an indefinite time operates as a discharge of the striking employees, and makes them eligible for benefits. This argument was rejected by the First Circuit in *Associated Grocers v. Adm'r of Employment Sec.*, 496 So.2d 450, 451-2 (La.App. 1 Cir.1986) *writ denied* 497 So.2d 1389 (La.1986):

> After reviewing the record of the instant case as a whole, we find that the trial court was correct in determining that the agency incorrectly applied the law. The claimants became unemployed because of a labor dispute. Even assuming that all the claimants were permanently replaced as of June 20, 1983, jurisprudence states that such action does not constitute a cessation of the labor dispute or the claimants'

participation or interest in the dispute within the meaning of LSA-R.S. 23:1601 (4). See *Elmer Candy Corp.*, 286 So.2d [423, 427-8 (La.App. 1 Cir.1973)]. Since the labor dispute itself had not ended, in order to obtain unemployment compensation benefits, it is incumbent upon the claimants to show that they were not participating in or interested in the labor dispute which caused their unemployment. *Senegal*, 197 So.2d [648, 651 (La.1967)]. The evidence in the record does not support the Board of Review's finding of disinterest.

The record shows that, at the time of the hearing, the claimants were no longer picketing, but that they were still members of the striking union, that they had picketed until they sought unemployment benefits, that at least one of them still would not cross established picket lines, that some of them were still passing out leaflets encouraging a boycott of the plaintiff, and that they had not asked to be reinstated although they claimed to be available for work either at plaintiff's establishment or elsewhere. The record also shows that there is no evidence that any of the claimants have been discharged by the plaintiff. In accordance with federal law, they continued to have the right to reinstatement upon application, as jobs became available. As expressed in *Elmer Candy Corp.*, 286 So.2d at 428, "as Union members, it could not be said that they were not interested in the labor dispute that they had originated, and which caused their unemployment." After a careful review of the record, we agree with the trial court that the claimants have not proven their lack of participation or interest in an ongoing labor dispute.

In this case, plaintiffs likewise have failed to show that they are no longer participating in or interested in the ongoing labor dispute with Bayou Steel Corporation. We are in agreement with our brethren on the First Circuit and, therefore, we find no error of law in the ruling of the Board of Review and the affirmation of same by the trial court that the plaintiffs were actively involved in a labor dispute and were disqualified from receiving unemployment benefits pursuant to La. R.S. 23:1601(4).

Both appellants next request that should this Court fail to reverse the decision of the Board of Review and of the district court, this matter should be remanded for the taking of evidence concerning the actions of Bayou Steel after the original hearing in this matter. These actions, it is argued, show that Bayou Steel is not in good faith in these labor negotiations and, therefore, there is no bona fide labor dispute within the meaning of La. R.S. 23:1601(4).

Appellants argue that a remand is necessary because (1) the identities of the workers to be terminated for strike misconduct has been revealed by Bayou Steel; and (2) the National Labor Relations Board has charged Bayou Steel with serious "law violations" which reflect issue of Bayou's good faith or lack thereof in negotiating with plaintiffs. We find that these allegations are not such as to warrant a remand in this case. There is no evidence to suggest that, at this time, any claimant has been terminated from employment and, therefore, all the claimants are employees actively involved in or interested in the labor dispute within the meaning of La. R.S. 23:1601(4). Second, any alleged violations of the National Labor Relations Act are separate and distinct from the issue of

whether the employees herein are entitled to unemployment compensation benefits and therefore are not relevant. Third, the claimants have made a claim based upon the facts at a particular time. If these facts have changed now, they form the basis for another claim. Otherwise, this claim would never be subject to final adjudication.

As stated supra, the Department of Labor also argues that existing Louisiana jurisprudence operates to violate state constitutional and statutory law and is in derogation of public policy. Basically, the department alleges that allowing the company to hire replacement workers, without granting the employees the right to collect unemployment benefits, tips the "balance of power" in favor of the company and unfairly prejudices the employees.

In *National Gypsum Co. v. Administrator, Dept. of Emp. S.*, 313 So.2d 230, 233 (La.1975), the Louisiana Supreme Court articulated the public policy behind La. R.S. 23:1601(4): "We thus regard the disqualification provision of La. R.S. 23:1601(4) as an expression of the public policy that the State remain neutral in labor disputes. The award or denial of unemployment compensation should not be available as a weapon to either labor or management, as they seek to resolve their differences." We adhere to this policy, pointing out, however, that the facts of National Gypsum and of this case are markedly different.

It has also been recognized that " . . . the intent of LSA-R.S. 23:1601(4) is undoubtedly to avoid placing an employer in a position of being compelled by state statute to subsidize a strike since the employer is required to pay substantial sums into a fund from which unemployment benefits are paid." *Cities Service v. Admin., La. Dept. of*

Emp., 383 So.2d 1315, 1318 (La.App. 3 Cir.1980); *Mascair v. Blanche*, 484 So.2d 190 (La.App. 5 Cir.1986).

We recognize that strikers who are disqualified from receiving benefits may be placed in a difficult financial position pending the resolution of an ongoing labor dispute. However, we do not believe that this hardship creates a violation of state statutory or constitutional law.

For the above discussed reasons, the findings of the Board of Review and the judgment of the 40th Judicial District Court upholding those findings are affirmed. All costs of this appeal are assessed against plaintiffs/appellants. See La. R.S. 13:5112(D).

AFFIRMED

THE SUPREME COURT OF THE STATE OF LOUISIANA

HARRY ABADIE, JR., ET AL

VS.

NO. 94-C - 2857

BAYOU STEEL CORPORATION AND HONORABLE GAYLE F. TRULY, SECRETARY OF LABOR

IN RE: Labor Department of; - Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of St. John Baptist 40th Judicial District Court Div. "C" Number 31,262; to the Court of Appeal, Fifth Circuit, Number 94-CA-0322

February 3, 1995

Denied.

CDK

WFM

JCW

HTL

BJJ

JPV

DENNIS, J. not on panel.

Supreme Court of Louisiana
February 3, 1995

/s/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

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PROVISIONS OF CONSTITUTION AND STATUTES
(in pertinent part)

A. Federal

U.S. Const. amend. V – . . . Due Process of Law . . .

No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV – Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

26 USC 3304. Approval of State laws

(a) Requirements. – The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that – . . .

(c) Certification. – October 31 of each taxable year the Secretary of Labor shall certify to the Secretary of the Treasury each State whose law he has previously approved . . . No finding of a failure to comply substantially with any provision in paragraph (5) of subsection (a) shall be based on an application or interpretation of State law (1) until all administrative review provided for under the laws of the State has been exhausted, or (2)

with respect to which the time for judicial review provided by the laws of the State has not expired, or (3) with respect to which any judicial review is pending. . . .

26 USC 3306. Definitions

(c) Employment. – For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him. . . .

29 USC 142. Definitions

. . . (2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reasons of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

29 USC 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by . . . (d) causing diminution of employment and wages in such volume as

substantially to impair or disrupt the market for goods flowing from or into the channels of commerce. . . .

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

29 USC 152. Definitions

. . . (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . .

42 USC 503. State laws

(a) Provisions required

The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for –

(1) Such methods of administration. . . . to be reasonably calculated to insure full payment of unemployment compensation when due;

* * *

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

* * *

(9)(b) Failure to comply; payments stopped

Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is –

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a) of this section;

the Secretary of Labor shall notify such State agency that further payments will not be made to the State until the Secretary of Labor is satisfied that there is no longer any such denial or failure to comply. . . .

42 USC 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress. . . .

B. State

LSA-Const. Art. 1, § 2. Due Process of Law

Section 2. No person shall be deprived of life, liberty, or property, except by due process of law.

LSA-Const. Art. 1 § 3. Right to Individual Dignity

Section 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations.

LSA-R.S. 23:1471. Short title; declaration of public policy

. . . As a guide to the interpretation and application of this Chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against the greatest hazard of our economic life. . . .

LSA-R.S. 23:1472. Definitions

(12)(A) "Employment" means . . . any services . . . performed for wages or under any contract of hire, written or oral, express or implied;

(19)(a) "Unemployment" – Any individual shall be deemed to be "unemployed" in any week during which he performs no services and with respect to which no wages are payable to him. . . .

LSA-R.S. 23:1601. Disqualification for benefits

An individual shall be disqualified for benefits:

(1)(a) If the administrator finds that he has left his employment from a base period or subsequent employer without good cause attributable to a substantial change made to the employment by the employer. . . .

(2)(a) If the administrator finds that he has been discharged by a base period or subsequent employer for misconduct connected with his employment. . . .

(4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment. For the purposes of this Subsection, if separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the

same premises, each such department shall be deemed to be a separate factory, establishment or other premises.

LSA-R.S. 23:1624. Monetary determination and notice of claim

An agent designated by the administrator shall take the claim. A determination of eligibility made on the basis of base period wage credits shall be made promptly. . . .

LSA-R.S. 23:1627. Determination in labor dispute cases

Whenever any claim involves the application of the provisions of R.S. 23:1601(4) the individual handling the claim shall, if so directed by the administrator, promptly transmit all evidence with respect to such case to the administrator. The administrator or the representatives he may designate shall, on the basis of the evidence submitted and such additional evidence as he may require, make a determination with respect thereto. Such determination shall be the final decision on the claim, unless within fifteen days after the date notification was given or was mailed to a party's last known address, an appeal is filed with an appeal tribunal.

LSA-R.S. 23:1634. Judicial review; procedure

A. Within the time specified in R.S. 23:1630, the administrator, or any party to the proceedings before the board of review, may obtain judicial review thereof by filing in the district court of the domicile of the claimant a

petition for review of the decision, and in such proceeding any other party to the proceeding before the board of review shall be made a party defendant. The petition for review need not be verified but shall state the grounds upon which such review is sought. The administrator shall be deemed to be a party to any such proceeding. . . .

B . . . In any proceeding under this Section the findings of the board of review as to the facts, if supported by sufficient evidence. . . . No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the board of review, and the board of review may, after hearing such additional evidence, modify its findings of fact or conclusions, and file with the court such additional or modified findings and conclusions, together with a transcript of the additional record. Such proceedings shall be heard in a summary manner and shall be given preference and priority over all other civil cases. . . .

LSA-R.S. 23:1635. Prompt payment of claims

A. If benefits are payable in any amount pursuant to a determination, redetermination, or a decision of an appeal referee, the board of review, or any court, such amount shall be promptly paid upon the issuance of such determination, redetermination or decision regardless of any appeal, or the pendency of the time for filing such appeal unless and until such determination, redetermination or decision, in which event benefits shall be paid or denied in accordance therewith for weeks of unemployment beginning subsequent to such redetermination or decision.

LSA-R.S. 23:1653. Duties and powers of administrator in general

The administrator shall administer this Chapter; and to that end he may adopt, amend, or rescind such rules and regulations, . . . and take such other action as he deems necessary.

LSA-R.S. 23:1691. Waiver of rights to benefits; agreements to pay employment contributions; discrimination against employees; penalty

No agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this Chapter shall be valid. No agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contribution, required under this Chapter, from such employer, shall be valid. No employer shall directly or indirectly make or require or accept any deduction from wages to finance the employer's contributions required from him, require or accept any waiver of any right hereunder by any individual in his employ, discriminate in regard to the hiring or tenure of work or any term or condition of work of any individual on account of his claiming benefits under this Chapter, or in any manner obstruct or impede the filing of claims for benefits. Any employer or officer or agency of an employer who violates any provision of this Section shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned for not less than one month nor more than six months, or both.

LSA-R.S. 36:304. Powers and duties of secretary of labor

A. In addition to the functions, powers, and duties otherwise vested in the secretary by law, he shall: . . .

(6) Act as the sole agent of the state and administrator of the Louisiana Employment Security Law . . . For this purposes he may take such actions, in accordance with applicable state law, necessary to meet such federal standards as are established for the administration and use of such federal funds, except as otherwise specifically provided in this Title or by the constitution and laws of this state.

Opinions, Judgments, and Orders Below
(in pertinent part)

1. Decision of Appeals Tribunal, La. Dept. of Labor, (July 9, 1993)

   No employees have been discharged or permanently replaced by new hires. No allegations of any misconduct has been made by the employer. This section of law [LSA-R.S. 23:1601(2)] does not apply and cannot be used to disqualify the claimants for unemployment insurance benefits. (emphasis provided)

   While I personally believe that workers who have been permanently replaced by strike replacements should not be disqualified for unemployment insurance benefits, the Louisiana courts have consistently rejected this idea. *Associated Grocers, Inc. v. Administrator,* 496 So.2d 450, 452 [La. App. 1st Cir. [1986]) writ denied, 497 So.2d 1389 (La. 1986); *Standard Materials, Inc. v. Administrator Div. of Employment Security, Department of Labor,* 401 So.2d 400, 401 (La. App. 1st Cir. 1981).

2. Decisions of the Board of Review, La. Dept. of Labor (August 4, 1993)

   There is no testimony or evidence indicating that claimants have been "discharged" from their employment. Rather, the record indicates that former "strikers" have returned to work with this employer. In accordance with federal law, they continue to have the right to reinstatement upon application, as jobs become available. *National Labor Relations Board v. Fleetwood Trailer Co., Inc.,* 389 U.S. 375, 88 Sup.Ct. 543, 19 L.Ed2d 614 (1967).

3. Decision of the La. Ct. of App., 5th Cir., (October 25, 1994), *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La.App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403.

   There is no testimony or evidence indicating that claimants have been "discharged" from their employment. Rather, the record indicates that former "strikers" have returned to work with this employer. In accordance with federal law, they continue to have the right to reinstatement upon application, as jobs become available. *National Labor Relations Board v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 88 Sup.Ct. 543, 19 L.Ed2d 614 (1967).

   The record also shows that there is no evidence that any of the claimants have been discharged by the plaintiff. In accordance with federal law, they continue to have the right of reinstatement upon application, *as jobs become available.* (emphasis added)

Quotes of Petitioner's State District Court Pleadings/ Memoranda

MEMORANDUM ON BEHALF OF THE SECRETARY OF LABOR TO THE DISTRICT COURT

* * *

As fiduciary of the Unemployment Compensation Fund, the Secretary of Labor, as Administrator of Employment Security, carries an obligation to investigate claims and to issue determination, as to qualification and eligibility, upon initial findings.

The original determination issued by the Administrator for these claimants was a disqualification for benefits under LSA-R.S. 23:1601(4). As this determination is and was an initial determination issued by the Administrator, based upon claim-taking information from the local offices as well as upon any protest information provided by the employer, this represents a simple outline of basic procedure for claims determination under LSA-R.S. 23:1624. This procedure also fulfills the promptness requirements for claim determination under 42 U.S.C. 503(1); *California Department of Human Resources Development v. Java*, 402 U.S. 121, 91 S.Ct. 1347 (1971); and LSA-R.S. 23:1635.

The subsequent determination issued by the Administrator was based upon deliberation of subsequently gathered facts both through telephone conversation directly with the employer as well as on-site visit and meeting with the employer. LDOL Chief of UI Benefits . . . initiated at least three telephone calls to the Company and additional investigation was conducted by LDOL UI Technical Services Specialist. . . . The on-site visit

occurred within two weeks of such phone calls in further fact finding . . . on April 27, 1993. Not only was discussion held at that time at the site of Bayou Steel, but also, its representative, Mr. Vasques provided a copy of an agreement by replacement workers entitled, "Acknowledgment of Offer". The precise language of the acknowledgment, which required signature by the replacement worker, provided as follows:

BAYOU STEEL CORPORATION

Acknowledgment of Offer

> I acknowledge and understand that I have been made an offer of regular full-time employment. I understand that it is the Company's present intent that my employment will continue after the conclusion of the strike, but that this cannot be guaranteed. I further understand that I am not being employed for any specific term of employment.
>
> I understand that my being hired is contingent upon satisfactory results from a medical examination and drug test.
>
> /s Victor Manual Garcia
> Name
>
> 03-23-93
> Date

This is specific, written declaration of the intent of the employer that such employment will continue, although not guaranteed. This intent reflects regular at-will employment recognized in the State of Louisiana. It does not limit employment to a temporary term or any contingency other than satisfactory results from medical examination and drug testing.

* * *

III. PURPOSE AND INTENT OF EMPLOYMENT SECURITY LAW

The very purpose of unemployment compensation is provided in the declaration of public policy under LSA-R.S. 23:1471. It is therein declared that this remedy for unemployment shall be to "prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family."

* * *

15. It is *not* public policy under the word and spirit of the law that a company can exercise its right to hire replacement workers and oppose comparable relief of unemployment compensation to the claimants.

* * *

. . . The very meaning that must be accorded this purpose is that the law of unemployment compensation must prevent the longevity of unemployment. Such purpose must be equally extended and recognized, in full neutrality, by the Administrator in *all* claims determinations despite cause of unemployment, affiliation, or partisan pressure.

To allow the employer to gain the upper hand by replacement of workers without penalty of UI benefits promotes and encourages the very longevity of the unemployment of the claimants in complete derogation of public policy. Any incentive for the employer to negotiate in good faith for resolution of any dispute shall be completely lost. The findings of fact clearly reveal that the Company is and continues to carry a double-edge sword that cuts both ways against the claimants. This company

seeks to soften the blow of this dispute with the claimants by open-ended employment of replacement workers. The begging question that must be fully answered by court in all fairness to the claimants is: What remedy remains for them to lessen their economic hardship when a collective-bargaining agreement has expired and the Company has replaced them.

An objective interpretation of LSA-R.S. 23:1601(4) realizes that the Legislature contemplated that a disqualification therein would involve the simple scenario of diligent and good faith negotiation by both parties without the complicated factors of replacement of workers and lockout which negate such scenario. The myopic view of jurisprudence thrust upon the Appeals Tribunal and the Board of Review by the Company destroys the very purpose of this sacred intent of the Legislature.

IV. EQUAL PROTECTION ACCORDED UNDER FEDERAL CONSTITUTIONAL LAW; STATE CONSTITUTIONAL LAW; AND LOUISIANA EMPLOYMENT SECURITY LAW

It is respectfully submitted to the Court that additional consideration should be even given as to any constitutional ramifications of denial of benefits to the claimants. It is significant to point out the scenario of the difference between the class of non-union claimants versus the class of union claimants. Illustrative of the difference in treatment of such two classes is as follows:

(1) Claimant A: Claimant A is a non-union worker under the right-to-work laws of the State of Louisiana. The employment contract of

Claimant A expires at midnight on March 20, 1993. While the former employer offers terms of new employment, such employer is hiring replacement workers under written agreement for indefinite, at-will employment. Claimant A is interested in negotiation to reach agreement in reemployment, but he is cognizant of the fact of such hiring of replacement workers. Claimant A files for unemployment compensation. Claimant A would be considered qualified for unemployment compensation under the discharge provisions of LSA-R.S. 23:1601(2) for having lost his job without disqualifying misconduct. Claimant A thus would receive unemployment compensation.

(2) Claimant B: Claimant B is a union worker, employed under a collective-bargaining agreement with the employer. The collective bargaining agreement of Claimant B expires at midnight on March 20, 1993. While the Company offers terms of new employment, it is hiring replacement workers under written agreement for indefinite, at-will employment. The union, as agent on behalf of Claimant B, is interested in further negotiation of terms of reemployment of its membership, but its membership is cognizant of the fact of such hiring of replacement workers. Claimant B files for unemployment compensation. Under case law interpretation of LSA-R.S. 23:1601(4), Claimant B must be denied unemployment compensation.

It is respectfully noted to the Court that the disparity in treatment in the above two (2) scenarios remains consistent even when Claimant A is a replacement worker.

Such constitutional discrimination and disparity against claimants was [sic] certainly not contemplated by the redactors of the provisions of LSA-R.S. 23:1601(4). *Pierre v. Administrator, Administrator, La. Office of Emp. S.*, 553 So.2d 442 (La. 1989). Such superficial interpretation by current case law of such statutory provision violates the very sanctity of the law. *National Gypsum*, supra. Such fabrication of classes of claimants by case law does not further any appropriate state interest, and thus violates equal protection provisions of both the State and Federal Constitutions. U.S.C.A. Const.Amends. 5, 14; LSA-Const. Art. 1, §§ 2, 3; *Pierre*, supra.

The case law further ignores LSA-R.S. 23:1691. Under the case law, there is a further creation of classes as illustrated below:

> (1) Claimant A: Claimant A is a non-union worker under the right-to-work laws of the State of Louisiana, commencing employment as of 1987. His single-employment contract expires at midnight on March 20, 1993. While the former employer offers terms of new employment, such employer is hiring replacement workers under written agreement for indefinite, at-will employment. Claimant A is interested in negotiation to reach agreement in reemployment, but he is cognizant to the fact of such hiring of replacement workers. Claimant A files for unemployment compensation. Claimant A would be considered qualified for unemployment compensation under the discharge provisions of LSA-R.S. 23:1601(2) for having lost his job without disqualifying misconduct. Claimant A thus would receive unemployment compensation.

> (2) Claimant B: Claimant B is a union worker, employed under a collective-bargaining agreement with employer. The commencement of such collective bargaining agreement with employer is 1987. Such collective contract with Claimant B expires at midnight on March 20, 1993. While the Company offers terms of new employment, it is hiring replacement workers under written agreement for indefinite, at-will employment. The union, as agent on behalf of Claimant B, is interested in further negotiation of terms of reemployment of its membership, but its membership is cognizant of the fact of such hiring of replacement workers. Under case law interpretation of LSA-R.S. 23:1601(4), Claimant B must be denied unemployment compensation. The adverse effect and impact upon Claimant B exercising his right to enter into a collective contract with the Company in 1987 is that he is penalized in his claim for unemployment compensation at the expiration of the terms of such contract when replacement workers for indefinite at-will employment are hired in his stead.

The consequence of for Claimant B is that LSA-R.S. 23:1691 is violated. Such provision in the law, states that "[n]o agreement by an individual to waive, release, or commute his rights under this Chapter shall be valid" and further carrier penalties in violation of such. It further imposes that "[a]ny employer or officer or agent of an employer who violates any provision of this Section shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned for not less than one month nor more than six months, or both.["] In short, the penalties provided under

such provision reflect the seriousness of offense contemplated by the Legislature in addressing the protection of such right to unemployment compensation.

* * *

SUPPLEMENTAL OPPOSITION BY ADMINISTRATOR TO THE DISTRICT COURT

* * *

The tone of BSC's reply brief shall not be addressed in respect for this Court. The sole purpose of this forum is to consider all of the difficult factors in determination. The following points, however, are made:

1. The right of any company and exercise thereof to hire replacement workers is not questioned by the Administrator, nor is it the intent of the Administrator to penalize any exercise of federal rights. The Administrator cannot, however, completely ignore the significance and relevancy of replacement workers for the purpose of unemployment compensation.

2. Neutrality is the utmost concern but does not necessarily mean denial of benefits. It does mean the balancing of hardship in the furtherance of dispute resolution. It does mean full and ongoing investigation of claims.

3. Federal law for the sake of fair labor relations and collective bargaining does not govern qualification for unemployment compensation. State employment security law and the interpretation thereof mandate such qualification. Any definition of employee or employment under the federal law discussed by the Company is solely restricted to the "subchapter[s]" of labor relations of the U.S. Code and does not apply to unemployment compensation. 29 U.S.C. 151 et seq., LSA-R.S. 23:1472 et seq.

4. The right to unemployment compensation and qualification thereof is SEPARATE AND APART from the

right to hire replacement workers and any duty to continue employment. While the scale of rights is in balance, the scale of economic relief must not be out-of-kilter. Interpretation of unemployment compensation law must serve to maintain balance of economic relief.

5. The Administrator does not argue for a change in the law. Relevancy of replacement workers is jurisprudential rather than by statute. The civilian scheme of Louisiana law allows for reconsideration of precedent decisions. Jurisprudence is neither frozen in time nor etched in stone.

6. LSA-R.S. 23:1601(4) contemplates only the simple scenario of a strike and active progress of negotiation, with the intent to encourage swift resolution by equally placing the claimant and the Company at economic disadvantage. Previous case law has seriously failed to recognize this contemplation, thereby disregarding the element of replacement workers. This fundamental intent of such law is thus thwarted.

7. The Company is erroneous in declaring that it has only two (2) Hobson-like choices. There is no denial of any right to replace, but this does not necessarily preclude any right to unemployment compensation. The Company's rights in labor relations correspond in like kind to that of the claimants. Likewise, unemployment compensation law must preserve an even balance. Such Hobson-like questions are rather more poised for the claimant where benefits are denied upon replacement of workers. The Company is indeed an active party to the process as well, making and exercising voluntary choices,

such as rejection, acceptance, offer, and replacement, with their own incumbent consequences or results.

8. The Administrator is, furthermore, not intervening or seeking any intervention on behalf of any party. To seek a judicial determination as to qualification upon a complete review of the facts on the record is not a plea for intervention. Any contrary declaration defies the neutrality of the Administrator and the Court.

9. Any court decision in favor of qualification is never intended to "finance" any party, but rather to balance the financial condition of each party.

10. In its discussion of classes of claimants, the Company confuses the body of federal law on labor relations with that of the state law binding upon unemployment compensation. The Company seeks to dismiss the notion of any possibility of discharge for the purpose of unemployment compensation on the grounds of unrelated labor law. Such federal law recognizes certain rights and duties of each party in dispute but does not and cannot impose restrictions on the issues of employment and qualification for the administration of unemployment compensation.

11. The Administrator continues to contend that the Louisiana Right to Work Law has been infringed upon if and where there is a disparity of qualification between the replaced claimant who refrains from joining a union and the replaced claimant who does join a union. It is respectfully asked of the court whether the employer cannot have best of both worlds, exercising it right to indefinitely replace workers while demanding denial of any financial relief to the workers. The Right to Work is

not only a prohibition against a requirement of joining a labor union, but its own language recognizes the right to join a union without penalty or reprisal, in reiteration of federal law.

12. There has been *no* determination by the Administrator as to whether either party has bargained in good faith. The true query that must be respected is whether current case law promotes incentive for good faith relations and prompt resolution of any dispute.

* * *

15. It is *not* public policy under the word and spirit of the law that a company can exercise its right to hire replacement workers and oppose comparable relief of unemployment compensation to the claimants.

* * *

DEVOLUTIVE APPEAL ON BEHALF OF DEFENDANT, GAYLE F. TRULY, SECRETARY OF THE DPARTMENT [sic] OF LABOR AND ADMINISTRATOR OF LOUISIANA EMPLOYMENT SECURITY

For a proper perspective, it is distinctly noted to Court, in its review of the findings of fact, that any terms and definitions of the NLRA do not bind the U.S. Department of Labor (USDOL) or the LDOL as to any determination of separation and qualification for unemployment compensation benefits thereof. The definition of employment of unemployment compensation purposes is strictly defined under LSA-R.S. 23:1472(19)(a), as follows:

> any individual shall be deemed to be "unemployed" in any week during which he performs no services and with respect to which no wages are payable to him or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount.

---

* * *

1.

The LDOL is aggrieved by the below judgment rendered by the Court of Appeal, Fifth Circuit, and left with the judgment that shall make it impossible for the department to fulfill its duty to administer the unemployment compensation (UC) law. The manifestly erroneous interpretation of statutory and constitutional law will unjustly impact the public interest and leave significant issues of law unresolved. The decision of the Court has excluded any recognition and analysis of the statutory elements of provisions of law under the Louisiana Employment Security Law (LESL). LDOL will be left with not knowing which factual aspects of any unemployment claim or which statutory components of the UC law to ignore and/or to apply.

2.

The lower courts have further committed gross and manifest error by applying the wrong body of governing law to the facts in this case, applying the premises of the Federal National Labor Relations Act (NLRA) in total disregard of the state UC law.

3.

As a result, the following statutory and constitutional provisions are at risk of future misinterpretation, misapplication, or non-application:

> U.S. Const.Amends. 5 and 14; LSA-Const. Arts. 1, §§ 2, 3 and Art. 5, §10; 26 U.S.C. section 3301

et seq. (Federal Unemployment Tax Act); 29 U.S.C. section 141 et seq. (Labor Management Relations Act); 29 U.S.C. section 151 et seq. (National Labor Relations Act); 42 U.S.C. section 501 et seq. (Social Security Act); LSA-R.S. 23:981 (Louisiana Right to Work Law); LSA-R.S. 23:1471, et seq. (Louisiana Employment Security Law); LSA-R.S. 23:1472(12) and 1472(19)(a); LSA-R.S. 23:1600; LSA-R.S. 23:1601(1) through 1601(4); LSA-R.S. 23:1624; LSA-R.S. 23:1627 through 1631; LSA-R.S. 23:1634 and 1635; LSA-R.S. 23:1651 and 1652; LSA-R.S. 23:1691; LSA-R.S. 36:304; LSA-C.C. Art. 2745 et seq.

4.

If the decisions of the lower courts are left to stand, the only question that LDOL will be unlawfully restricted to ask in the future is whether (1) the claimant is a member of a union and (2) whether there is a work stoppage. LDOL cannot delve further to determine any other facts and applicable statutory or constitutional elements. Disqualification of such kind of claimant will be automatic. The federal and state constitutions, The LESL, Federal Unemployment Tax Act (FUTA), and the Louisiana Right to Work Law (RTW) will have no bearing upon an unemployment compensation claim and provide no protection to a particular class of workers.

* * *

8.

UC law derives not from the National Labor Relations Act (NLRA), but from the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA). Such

result will jeopardize compliance with FUTA's definition of unemployment . . .

9.

If FUTA is to be applied under NLRA dictates and the lengthy wait for National Labor Relations Board (NLRB) decisions, the very purpose of prompt payment required under *California Department of Human Resources Development v. Java*, 402 U.S. 121, 91 S.Ct. 1347 (1971) is denied.

10.

In particular, if this Court adopts the reasoning of the Court of Appeal, LDOL is left with judicial interpretation that:

> a. an expiration of contract of employment is irrelevant for determination of UC claim as to cause of unemployment for union workers (but not irrelevant for non-union workers). LSA-R.S. 23:1601(2).
>
> b. the definitions of "employment" and "unemployment" are to be ignored when a union worker files an UC claim. LSA-R.S. 23:1472(12), (19).
>
> c. NLRA criteria are imposed upon the UC program.
>
> d. the statutory factors of disqualification under LSA-R.S. 23:1601(4) must be ignored. Pursuant to the Court's interpretation, if any work stoppage exists, and the claimant is a union

worker, then a disqualification is assessed without consideration of the specific components within the statute.

e. the application of LSA-R.S. 23:1601(4) is rendered unconstitutional, resulting in disparate treatment of union workers compared to non-union workers in violation of equal protection rights. Upon expiration of contract, a non-union worker is terminated and is otherwise eligible for UC benefits under LSA-R.S. 23:1601(2).

The lower courts' decisions and prior case decisions are, therefore, (1) in violation and derogation of applicable law and the state and federal constitution; and (2) leaves significant issues of law unresolved, which must be reversed by court.

* * *

SPECIFICATIONS OF ALLEGATIONS OF ERROR

SPECIFICATION OF ERROR NO. 1: LOWER COURT OF APPEAL ERRONEOUSLY APPLIES WRONG BODY OF LAW TO DEFINITIONS OF "UNEMPLOYMENT" AND "EMPLOYMENT" FOR UC PURPOSES.

SPECIFICATION OF ERROR NO. 2: LOWER COURT OF APPEAL FAILS TO RECOGNIZE EXPIRATION OF CONTRACT OF HIRE FOR PURPOSES OF QUALIFICATION FOR UC.

* * *

SPECIFICATION OF ERROR NO. 6: CONSTRUCTION OF LSA-R.S. 23:1601(4) BY COURT OF APPEAL VIOLATES CONSTITUTIONAL RIGHTS OF EQUAL PROTECTION ACCORDED UNDER FEDERAL CONSTITUTIONAL LAW; STATE CONSTITUTIONAL LAW; AND LOUISIANA EMPLOYMENT SECURITY LAW.

* * *

SUMMARY OF ARGUMENT

* * *

There is further failure to distinguish the NLRA from the LESL. Thus, the Court confused the concept of unemployment for unemployment compensation purposes, erroneously applying the NLRA concepts of continued employment and rights of reinstatement.

* * *

ARGUMENT

SPECIFICATION OF ERROR NO. 1: LOWER COURT OF APPEAL ERRONEOUSLY APPLIES THE WRONG BODY OF LAW TO DEFINITION OF "UNEMPLOYMENT" AND "EMPLOYMENT" FOR UC PURPOSES.

The NLRA does not bind the U.S. Department of Labor (USDOL) or the LDOL as to any determination of employment separation or qualification for UC benefits. "Unemployment" for UC purposes is strictly defined under LSA-R.S. 23:1472(19)(a),

> any individual shall be . . . "unemployed" any week during which he performs no services and with respect to which *no wages* are payable to him or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount (emphasis added)

Under LSA-R.S. 23:1472(12),

> "Employment" means . . . any services including service in interstate commerce, performed *for wages* or under any contract of hire, written or oral, express or implied (emphasis added)

Under the NLRA, claimants who are obviously unemployed for UC purposes, by contrast, continue to be employed and have other certain protected rights, even where no services are performed or their contract of hire expires. Reinstatement is not treated as a "new" hire under the NLRA, while reinstatement is defined as a new hire/job under FUTA at 26 U.S.C. section 3304(a). For UC purposes, it is *absolutely impossible* for an individual to be employed and unemployed at the same time; however, the decisions of both the lower courts and the Board of

Review (BOR) have mistakenly confused administration and interpretation of the UC law with NLRA.

The BOR and the lower courts here have inconsistently applied various laws to fulfill their decisions. On one hand, the lower bodies have utilized the NLRA definition of "continued employment", dismissing applicability of LSA-R.S. 23:1472(19), LSA-R.S. 23:1601(1), LSA-R.S. 23:1601(2), and C.C. Art. 2745 *et seq.* to thereby justify their decisions that the claimants are *not* unemployed. On the other hand, the lower bodies have weakly attempted to apply the state law under LSA-R.S. 23:1601(4) to find *status of unemployment* that is disqualifying. Thus, the court erroneously denied the applicability of LSA-R.S. 23:1601(1) and LSA-R.S. 23:1601(2) under reasoning that the claimants were *employed* (emphasis added), at the same time applying LSA-R.S. 23:1601(4) for the proposition that claimants were *unemployed* due to a labor dispute. Neither the BOR nor the courts can have it *both ways* in the proper administration of the law. "Shuttling" of claims to such absurd results is unacceptable.

* * *

For purposes of UC, claimants are *unemployed immediately* upon their separation from employment as a result of the expiration of their contract of hire. There is no longer an employer-employee relationship upon expiration of contract. In claims determination, LDOL's only concern is whether services are being performed for wages and whether a contract of hire exists in the claim period. If not, under LSA-R.S. 23:1472(19), the claimants are unemployed as to the application of *all* the applicable

provisions of qualification under LSA-R.S. 23:1601(1), (2), and (4).

The lower court failed to distinguish and separate the NLRA and UC law. Although the claimants no longer had a job, the Court of Appeal unjustifiably refused to acknowledge the basic premise of the unemployment insurance program and in its lack of understanding, refused to apply LSA-R.S. 23:1601(2). Instead, the Court substituted the NLRA concepts of "continued employment" and "right of reinstatement".

SPECIFICATION OF ERROR NO. 2: THE DECISION OF THE LOWER COURT OF APPEAL FAILS TO RECOGNIZE EXPIRATION OF THE CONTRACT OF HIRE FOR PURPOSES OF QUALIFICATION FOR UC.

* * *

In this case, the term of the employment contract expired on 03/20/93. For LESL, the employer-employee relationship ended immediately upon expiration of the contract.

* * *

It is noted that any performance for wages after 03/20/93 would be under a *new* contract of hire or at-will employment. "New work" under FUTA at 26 U.S.C. section 3304(a), has been interpreted to include the offer of reemployment to an unemployed individual by the last employer or some other previous employer and is considered a *new* contract of employment. The record shows that the Company had conceded that the contract expired. Thus, such claim analysis contrasts the NLRA concepts of continued employment.

* * *

One can hardly be unemployed *through his own fault* where (1) he has an expired contract of hire and (2) suitable work is unavailable. The NLRA simply addresses fair labor negotiating standards to be followed by employers and unions in negotiations. NLRA has absolutely nothing to do with UC. No rights under UC law can be waived, released, or commuted under 42 U.S.C. section 3303(a)(1) and LSA-R.S. 23:1691.

* * *

The course of claim examination and the statutory elements of law were fully ignored, causing a material injustice to the public and leaving the Administrator with an impossible means of administering this law.

* * *

The Administrator does *not* argue for a change in the law.

* * *

SPECIFICATION OF ERROR NO. 5: JURISPRUDENTIAL INTERPRETATION OF LSA-R.S. 23:1601(4) VIOLATES FEDERAL AND STATE STATUTORY RESTRICTIONS OF 42 U.S.C. SECTION 3303(A)(1) AND LSA-R.S. 23:1691 FOR PRESERVATION OF RIGHTS AND BENEFITS.

Under LSA-R.S. 23:1691, "[n]o agreement by an individual to waive, release, or commute his rights under this Chapter shall be valid" and further carries penalties for any violation of such protection of unemployment rights. It further imposes that "[a]ny employer or officer or agent of an employer who violates any provision of this

Section shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned for not less than one month nor more than six months, or both." In short, the penalties provided under LSA-R.S. 23:1691 reflect the seriousness of offense contemplated by the Legislature in addressing the protection of such right to UC under 42 U.S.C. section 3303(a)(1) and Louisiana law.

Under the case law there is a further creation of classes as illustrated below:

1. CLAIMANT A is a non-union worker under the right-to-work laws of the State of Louisiana, commences employment in 1987. His single-employment contract has original expiration date of 02/28/93, with two (2) subsequent extensions, ultimately expiring at midnight 03/20/93. On 03/21/93, CLAIMANT A is unemployed under LSA-R.S. 23:1472(19)(a). While the former employer offers terms of new contract of hire, employer hires replacement worker under written agreement for indefinite, at-will employment. CLAIMANT A is interested in negotiation to reach agreement in reemployment, but he is cognizant of the fact of such hiring of replacement workers. CLAIMANT A files for UC. CLAIMANT A is qualified for UC under discharge provisions of LSA-R.S. 23:1601(2) for having lost his job without disqualifying misconduct. CLAIMANT A receives UC.

2. CLAIMANT B is a union worker, employed under collective-bargaining agreement with employer. Terms of collective-bargaining agreement commence in 1987. Collective-bargaining

> agreement has original expiration date of 02/28/93, with two (2) extensions, ultimately expiring at midnight on 03/20/93. On 03/21/93, CLAIMANT B is unemployed under LSA-R.S. 23:1472(19)(a). While Company offers terms of new contract of hire, it hires replacement workers under written agreement for indefinite, at-will employment. The union, as agent on behalf of CLAIMANT B, is interested in further negotiation of terms of reemployment of membership, but its membership is cognizant of Company's hiring of replacement workers. Claimant B files for UC. Under case law interpretation of LSA-R.S. 23:1601(4), CLAIMANT B is automatically denied UC.

The adverse effect and impact upon CLAIMANT B exercising his right to enter into a collective contract with the Company in 1987 is that he is penalized in his claim for UC at the expiration of the terms of such contract in 1993 despite the employment of replacement workers for indefinite at-will employment in his stead.

Such consequence for CLAIMANT B is that federal law and LSA-R.S. 23:1691 is violated and the collective contract serves not only as an employment contract, but also as a contract of automatic waiver of UC benefits in direct violation of the intent of federal law and LSA-R.S. 23:1691.

By contrast, the rationale of the attached Charts 1 and 2 does not impose automatic denial of benefits merely due to a cursory conclusion of a labor dispute under LSA-R.S. 23:1601(4). Denial of benefits under these charts is triggered by actions and behavior of the parties within any dispute. This rationale is not based on any distinction

of collective work agreement, upon which existing case law relies. There is no automatic waiver of benefits under such rationale of the attached charts and, therefore, no violation of 42 U.S.C. section 3303(a)(1) and LSA-R.S. 23:1691.

* * *

SPECIFICATION OF ERROR NO. 6. CONSTRUCTION OF LSA-R.S. 23:1601(4) BY COURT OF APPEAL VIOLATES CONSTITUTIONAL RIGHTS OF EQUAL PROTECTION ACCORDED UNDER FEDERAL CONSTITUTIONAL LAW; STATE CONSTITUTIONAL LAW; AND LOUISIANA EMPLOYMENT SECURITY LAW.

Serious consideration should be given to any constitutional ramifications of denial of benefits to the claimants who fulfill terms of agreement under existing Louisiana law. It is significant to point out the scenario of the difference between the class of non-union claimants versus the class of union claimants. Illustrative of the difference in treatment of such two (2) classes under such case law is as follows:

> (1) CLAIMANT A is a *non-union* worker under the right-to-work laws of the State of Louisiana. The single-employment contract of CLAIMANT A has original expiration date of 02/28/93, with two (2) extensions, expiring at midnight on 03/20/93. On 03/21/93, CLAIMANT A is unemployed under LSA-R.S. 23:1472(19)(a). While the former employer offers terms of new employment to former employee, employer hires a replacement worker under written agreement for indefinite, at-will employment.

> CLAIMANT A is interested in negotiation to reach agreement of reemployment but is cognizant of the fact of such hiring of a replacement worker. CLAIMANT A files for UC. CLAIMANT A would be considered qualified for UC under the discharge provisions of LSA-R.S. 23:1601(2) for having lost his job without disqualifying misconduct. CLAIMANT A, thus, receives UC.
>
> (2) CLAIMANT B is a *union* worker, employed under a collective-bargaining agreement with the employer. The collective-bargaining agreement of CLAIMANT B has original expiration date of 02/28/93, with two (2) extensions, expiring at midnight on 03/20/93. On 02/2193, CLAIMANT B is unemployed under LSA-R.S. 23:1472(19)(a). While employer offers terms of new employment, it hires replacement workers under written agreement for indefinite, at-will employment. The union, as agent on behalf of CLAIMANT B, is interested in further negotiation of terms of reemployment of its membership, but its membership is cognizant of the fact of hiring of replacement workers. CLAIMANT B files for UC. Under the simplistic case law interpretation of LSA-R.S. 23:1601(4), CLAIMANT B is automatically denied UC.

The disparity in treatment in the above two (2) scenarios remains consistent even when CLAIMANT A is a replacement worker under an expired contract.

* * *

Superficial interpretation by current case law of such statutory provision violates the very sanctity of the law. *National Gypsum*, 313 So.2d 230. Such fabrication of classes of claimants by case law does not further any appropriate or compelling state interest, and thus violates

equal protection provisions of both the State and Federal Constitutions. U.S. Const. Amends. 5, 14; Const. Art. 1, §§ 2, 3;. . . .

By contrast, Charts 1 and 2 reveal proper interpretation of LSA-R.S. 23:1601(4) whereby all claimants, union or non-union, are equally treated and protected under the same type of separation. It is also added that such Charts 1 and 2 clarify elements that must be met by parties in application of LSA-R.S. 23:1601(4). See also outline of elements of LSA-R.S. 23:1601(4) above.

It is pointed out that the Company has sought before the lower court to erroneously dismiss the notion of any possibility of discharge for the purpose of UC on the grounds of the *unrelated* NLRA. In its discussion of classes of claimants, the Company confuses federal law on labor relations with federal and state laws binding upon UC. As discussed in this brief, such federal law recognizes certain rights and duties of each party in dispute and can even aid in determining the behavior of the parties, but such federal law does not and cannot impose restrictions on the issues of employment and qualification for the administration of UC.

* * *

The serious consequence of Louisiana jurisprudence . . . is that it grants one party the unfair advantage and the prerogative to manipulate the very terms and progress of negotiations, thus, allowing the employer the freedom to prolong negotiation, without any harm for as long and arduous as it desires.

* * *

Administrative Record

[p. 10] ADAMS: Does the company have a collective bargaining agreement with local 9121?

FLANAGAN: It currently does not.

ADAMS: They – I assume then that the agreement is expired?

FLANAGAN: Yes, it has.

* * *

[p. 33] ROBEIN: Can you read the statement attributed to him?

FLANAGAN: We have every intent to keep them as long term employees.

ROBEIN: Keep who? There's a previous sentence.

FLANAGAN: Oh, as for the replacement workers, it says, "We every intent to keep them as long term employees."

ROBEIN: Isn't there a sentence before that? Let me read it to you. "When the strike ends, Bayou Steel expects to reinstate the workers on strike only if jobs are available."

* * *

[p. 36] ROBEIN: (cont.) plant before the strike started?

FLANAGAN: We took applications for the positions that were listed in the ad, yes.

ROBEIN: That's every position in the plant.

FLANAGAN: May very well be. I don't know. I don't remember all the positions we listed here, but it was our intent to interview for positions in the plant.

ROBEIN: For every position in the plant subject to the strike, correct?

FLANAGAN: If we had the potential of every position being vacant, yes.

ROBEIN: And you've got an application for every position in the plant, do you not?

FLANAGAN: I cannot say that's true, no.

ROBEIN: You don't know?

FLANAGAN: I just don't know at this point and time.

ROBEIN: The strike didn't start until March 21, why were you taking up to 500 applications for just about every position in the plant?

FLANAGAN: I believe on February 26, the union informed us that they had taken a strike vote, that they'd sought a strike vote from their members and had received approval to call a strike at any time upon the expiration of the contract which was supposed to expire on February 28.

ROBEIN: But it didn't.

FLANAGAN: There was an extension made, I think, until – the first extension was till March 10.

ROBEIN: Several extensions, right? There's more than one extension.

FLANAGAN: I believe there is (sic) two extensions.

* * *

[p. 39] ROBEIN: (cont.) workers on strike only if jobs are available."

ADAMS: That's not a quote –

ROBEIN: It's in the file.

ADAMS: – is it?

ROBEIN: It's, it's attributed to Mr. Gonzales.

FLANAGAN: I don't, I don't see that as characterizing as being attributed to Mr. Gonzales. This is a statement by the reporter from what I can see.

ROBEIN: Is it an untrue statement? Is it an untrue statement?

FLANAGAN: Is it an untrue statement?

ROBEIN: You've indicated that you know any and everything about ali plans regarding replacement workers. Is that an untrue statement, that sentence that I just read from that article.

FLANAGAN: No, it's not an untrue statement if the job, if their job is available, they'll be returned to it at the end of the strike.

ROBEIN: How many jobs right now are not available for filling, for filling by striking employees, how many jobs?

FLANAGAN: Can you repeat your question again, sir, so I understand it.

ROBEIN: How many jobs today are not available to Mr. Ferraro, Mr. Porter and the other individuals that are subject to this disqualification (inaudible), how many –

FLANAGAN: Zero.

ROBEIN: Zero?

FLANAGAN: Zero.

ROBEIN: How do you explain the previous statement that after the strike there may not be jobs available for them?

[p. 40] ROBEIN: There may not be jobs available.

FLANAGAN: There may not be jobs available.

ROBEIN: You don't know that what jobs are available and what jobs aren't, do you?

* * *

[p. 42] ROBEIN: I'm asking you now. I'm not asking you about his questions. I'm asking you, how many employees are subject to possible discharge upon the conclusion of this strike?

FLANAGAN: I don't know.

ROBEIN: More than one?

FLANAGAN: Possibly.

ROBEIN: Could it be more than 10?

FLANAGAN: I don't know that.

ROBEIN: You know, and I know that, y'all have reams of video of picket line activity and you probably know that during the course of negotiations, Mr. Gonzales and Mr. Hank Vasquez of your company have indicated that a nonspecified number of striking employees will be subject to discharge upon the conclusion of the strike and the decision will be made upon the conclusion of the strike concerning those person's eligibility for rehiring, you know that, don't you?

FLANAGAN: I do not agree with your characterization of the question. I know there have been statements that we feel there may be employees that have potentially had serious misconduct during the strike.

ROBEIN: And who could potentially be fired?

FLANAGAN: I don't believe we've made that determination.

ROBEIN: You're not –

FLANAGAN: In fact, we've not made those determinations yet.

ROBEIN: Are you in the loop, so to speak, with respect to that decision making, will you be part of that decision making?

* * *

[p. 87] ROBEIN: So if tomorrow the claimants come back to work will they be working under the old contract? If the claimants were to come back to work today, at 1:00 this afternoon, would they be working under the old contract or the May 18th proposal?

FLANAGAN: Every worker that seeks to return to his job comes back under the pay and benefits contained under the old contract.

ROBEIN: For how long?

ADAMS: I have to object to that question. It calls for pure speculation.

JUDGE: Okay.

ADAMS: It depends on so many variables that there's no possible way that this witness can answer this question.

JUDGE: All right. It's interesting so I'll overrule and see if he can answer the question.

ROBEIN: For how long – would they work under the old contract?

FLANAGAN: Until such time that a new contract is negotiated between the parties. Or that the parties would reach impasse, an impasse would be declared, and there may be implementation of certain items of the proposal by the company. And –

* * *

[p. 93] ROBEIN: – 16. Are these the – the employees identified by job title, are these persons hired after March 21 or do they include employees that originally struck on March 21 and returned to work?

FLANAGAN: These include only new hires after March 21, 1993.

ROBEIN: Literally strike replacements?

FLANAGAN: That's correct.

ROBEIN: Do we have a total?

FLANAGAN: There's been a total of 122 hired, I think, as I testified on Monday.

ROBEIN: And they're all reflected in here?

FLANAGAN: Yes.

* * *

[p. 94] ROBEIN: Number seven states, "The decision as to whether striking employees will be allowed to return and displace replacement workers will be decided when the request to return to work is made." Do you know who the author of number seven is?

FLANAGAN: Can I read it again, Mr. Robein?

ROBEIN: Sure. I'm referring to item seven on Claimant's Exhibit 18.

FLANAGAN: Thank you. As far as the specific person that authored it, I'm not quite sure, but I know it was prepared under the direction of legal counsel.

ROBEIN: Fred Sullivan, Mr. Sullivan your labor counselor?

FLANAGAN: I believe it was prepared under the direction of Fred Sullivan and also Bob Devit (phon.).

* * *

[p. 95] ROBEIN: If 250 strikers returned right now, would there be jobs for them?

FLANAGAN: Each one of the returning strikers' ability to return would be based on a review, as I said earlier, of their individual request for reinstatement.

ROBEIN: What if – what if everyone reported en masse, 250 plus?

FLANAGAN: We would review each individual for – as I say earlier, potential serious misconduct in regard to the strike.

* * *

QUOTES OF PERTINENT CASES

FEDERAL CASES:

402 U.S. 121, 28 L.Ed.2d 666
CALIFORNIA DEPARTMENT OF
HUMAN RESOURCES DEVELOPMENT et al.,

v.

JAVA et al., 402 U.S. 121 (1971)

Page 91 S.Ct. 1355 follows

We conclude that the word 'due' in s 303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment. Paying compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes. It seems clear therefore that the California procedure, which suspends payments for a median period of seven weeks pending appeal, after an initial determination of eligibility has been made, is not 'reasonably calculated to insure full payment of unemployment compensation when due.'

440 U.S. 519

NEW YORK TELEPHONE COMPANY et al., Petitioners,

v.

NEW YORK STATE DEPARTMENT OF LABOR et al.,
440 U.S. 519 (1979)

* * *

The omission of any direction concerning unemployment compensation payments to strikers in either the National Labor Relations Act or the Social Security Act implies that Congress, which was undeniably aware of the possible impact of unemployment compensation on the bargaining process, intended that the states be free to authorize or even prohibit such payments, . . .

* * *

(a) This case does not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field but rather involves a state program for the distribution of benefits to certain [440 U.S. 520] members of the public.

* * *

In any event, a State's power to fashion its own policy concerning the payment of unemployment compensation is not to be denied on the basis of speculation about the unexpressed intent of Congress.

* * *

Undeniably, Congress was aware of the possible impact of unemployment compensation on the bargaining process. The omission of any direction concerning payment to strikers in either the National Labor Relations

Act or the Social Security Act implies that Congress intended that the States be free to authorize, or to prohibit, such payments. (FN43)

* * *

On several occasions since the 1930's Congress has expressly addressed the question of paying benefits to strikers, and especially the effect of such payments on federal labor policy. (FN44) On none of these occasions has it suggested that such [440 U.S. 545] payments were already prohibited by an implicit federal rule of law. Nor, on any of these occasions has it been willing to supply the prohibition. The fact that the problem has been discussed so often supports the inference that Congress was well aware of the issue when the Wagner Act was passed in 1935, and that it chose, as it has done since, to leave this aspect of unemployment compensation eligibility to the States.

STATE CASES:

ELMER CANDY CORPORATION

v.

ADMINISTRATOR OF EMPLOYMENT SECURITY, 286 So.2d 423 (La.App. 1st Cir. 1973), rehearing denied.

* * *

It is readily apparent that under the well established provisions of the Federal Labor Law that the claimants were entitled to reinstatement if jobs become available. However, there is no evidence that any of the claimants made any effort to be reinstated if jobs became available. Their right to be reinstated could only be defeated if the

employer could show 'legitimate and substantial business justifications.' *National Labor Relations Board v. Great Dane Trailers*, 388 U.S. 26, 34, 87 S.Ct. 1792

NATIONAL GYPSUM COMPANY

v.

ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, 313 So.2d 230 (La. 1975)

* * *

In enacting the unemployment compensation statute, the legislature solemnly declared that, 'as a guide to the interpretation and application' of its statutory provisions, 'the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life.' Thus unemployment compensation is not paid primarily to reward the employee nor to punish the employer, but rather to protect the stability of the state and of the family, by relieving the family distress and the menace to the public welfare occasioned through unemployment of individual workers.

* * *

However, the legislature also provided for the disqualification from such benefits for employees who left

employment or refused to accept it without good cause or who had been discharged for misconduct. La.R.S. 23:1601(1), (2) (see footnote 1 above). It additionally provided that employees could not receive benefits for unemployment 'due to a labor dispute which is in active progress' on the premises.

* * *

In view of the strong public policy of the act designed to avoid crushing hardship on unemployed workers and their families, we think the more reasonable interpretation of the disqualification to be that unemployment due to 'a labor dispute in active progress' includes only unemployment resulting from labor disputes in which the employee himself actively engages by refusing to work.

PIGGLY WIGGLY OF SPRINGHILL, INC.

v.

GERACE, 370 So.2d 1327 (La.App. 2d Cir. 1979)

* * *

The National Labor Relations Act, 29 U.S.C.A. 152(3), is clear in its provision that an employee whose work has ceases as a consequence of a labor dispute continues to be an employee if he has not obtained a regular and substantially equivalent employment. *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 88 S.Ct. 543.

* * *